

Morgan Lewis

# TECHNOLOGY MAY-RATHON

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

June 16, 2021

Ezra D. Chuch

Kristin M. Hadgis

Megan A. Suehiro

© 2021 Morgan, Lewis & Bockius LLP

# Presenters



**Ezra D. Church**



**Kristin M. Hadgis**



**Megan A. Suehiro**

**Morgan Lewis**

# Introduction and Roadmap

The background of the slide is a dark, abstract digital landscape. It features a grid of glowing lines in various colors (blue, purple, red, green) that recede into the distance, creating a sense of depth. The lines are connected by small, bright points of light, resembling a network or data flow. The overall effect is futuristic and technological.

Morgan Lewis

# Presentation Roadmap

- Ensuring you have an enforceable agreement
- Taking a closer look at online consumer contracts
- How to get the language right
- Recent litigation trends

# Electronic Contracting and Class Action Litigation

- Recent surge in the adoption of electronic contracting
  - For Q1 2021, U.S. eCommerce sales grew 39% year-over-year, to \$199 billion
  - Nearly \$1 in \$5 spent on retail purchases during the quarter came online
- Class action litigation is growing
  - Uptick in consumer class actions in the wake of COVID-19
- Careful use of online contracts with consumers can help mitigate and avoid risk
  - Dispute resolution provisions requiring arbitration and class waiver can protect companies from many class actions

(Sources: Forbes, Digital Commerce 360)



# Ensuring You Have an Enforceable Agreement

Morgan Lewis

# Online Contracting – Background

- Electronic contracting is on the rise
- In the United States, electronic signatures are generally enforceable
  - “**Electronic signature**” = “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.” 15 U.S.C. § 7006(5).
  - “**Digital signature**” = a type of electronic signature intended to alleviate the issues regarding genuineness, identity, and document modification with electronic signatures. Typically incorporates key encryption to identify the signer and has a function to verify the document being signed.

## Online Contracting – Background

- Two laws generally govern the use of electronic signatures in the United States:
  - **Electronic Signatures in Global and National Commerce Act** (“E-Sign”)
  - **Uniform Electronic Transactions Act** (“UETA”)
- Each establishes the general rule that electronic signatures are valid and enforceable and set certain requirements for and exceptions to the general rule
- Key exceptions



## Online Contracting – E-Sign Act

- Equates electronic signatures and other records with those penned in ink
- Not limited to parties who agree to transact business by electronic means
- Requirements
  - Intent to sign
  - Attribution
  - Association
  - Retention
  - Consumer protection issues



## Online Contracting – UETA

- Adopted by all states except three (IL, NY & WA)
- All parties to an agreement or transaction must agree to conduct the transaction using electronic means
- Requirements similar to E-Sign:
  - Intent to sign
  - Association of signature with the record
  - Attribution
  - Retention
- If the contract cannot be stored or printed, it is not enforceable
- Some documents require wet ink signatures, such as negotiable instruments

# Traditional Contract Principles Apply Online

- **Offer:**
  - Manifestation of willingness to contract
- **Acceptance:**
  - Consistent with the “mailbox rule,” a contract is effective upon act or acceptance rather than acknowledgment or receipt
  - What acts are required to indicate acceptance is a matter of significant litigation (e.g., clickthrough, clickwrap, browsewrap, etc.)
- **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?

# Traditional Contract Principles Apply Online

- Common contract problems:
  - Lack of mutual assent
  - Substantive unconscionability
  - Procedural unconscionability and adhesion
  - Statute of frauds
  - Proving it exists!



# Online Consumer Contracts

The background of the slide is a dark, abstract digital landscape. It features a grid of glowing lines in various colors, including blue, purple, and red, that create a sense of depth and movement. The lines are arranged in a way that suggests a digital terrain or a network of data points. The overall effect is futuristic and high-tech.

Morgan Lewis

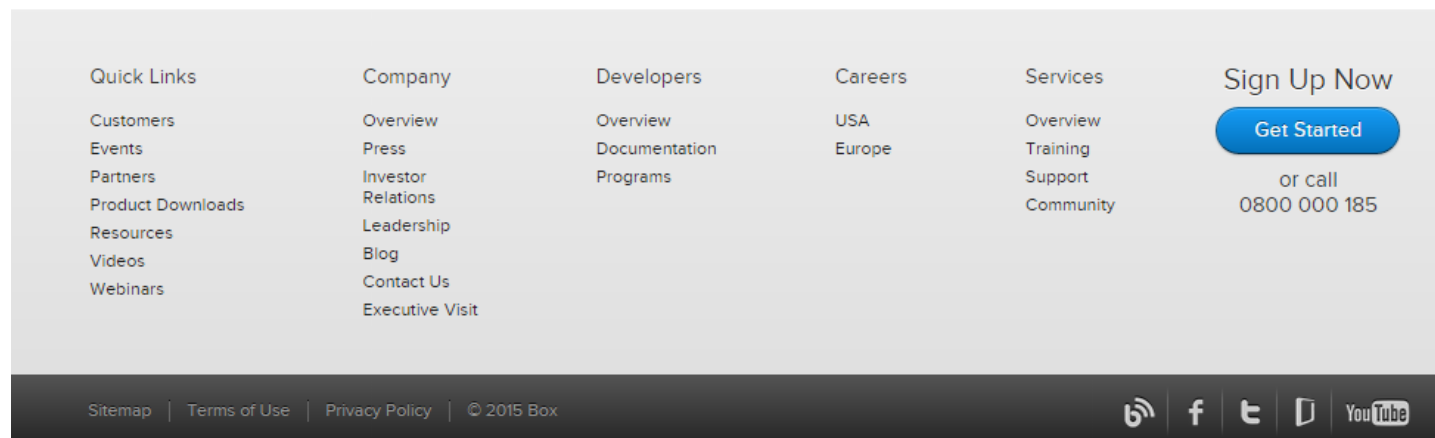
# Common Types of Online Consumer Contracts

- Scrollwrap: Requires users to review and affirmatively assent to the terms of use before they can access the website and its services



# Common Types of Online Consumer Contracts

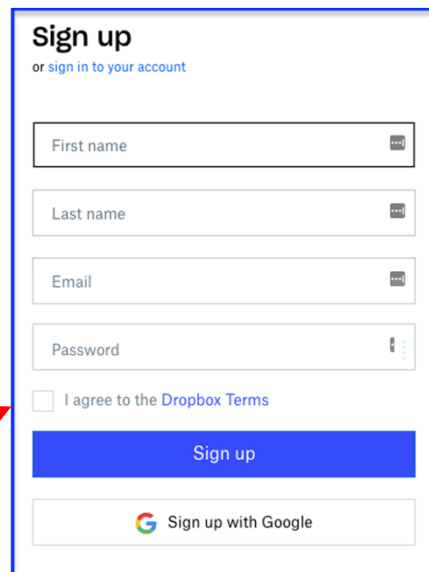
- Browsewrap: Does not require the user to take any affirmative action to assent to the terms



Morgan Lewis

# Common Types of Online Consumer Contracts

- Clickwrap / modified clickwrap: Terms are only visible via a hyperlink; user clicks a button to assent to the hyperlinked terms



**Sign up**  
or sign in to your account

First name


Last name

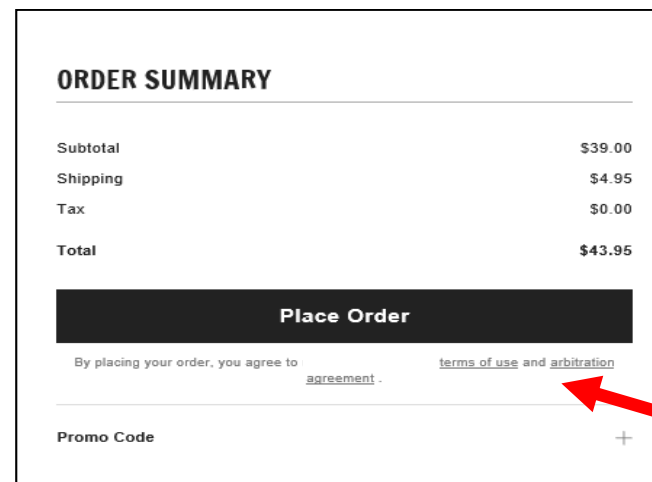
Email

Password

I agree to the [Dropbox Terms](#)

**Sign up**

 Sign up with Google



**ORDER SUMMARY**

Subtotal	\$39.00
Shipping	\$4.95
Tax	\$0.00
<b>Total</b>	<b>\$43.95</b>

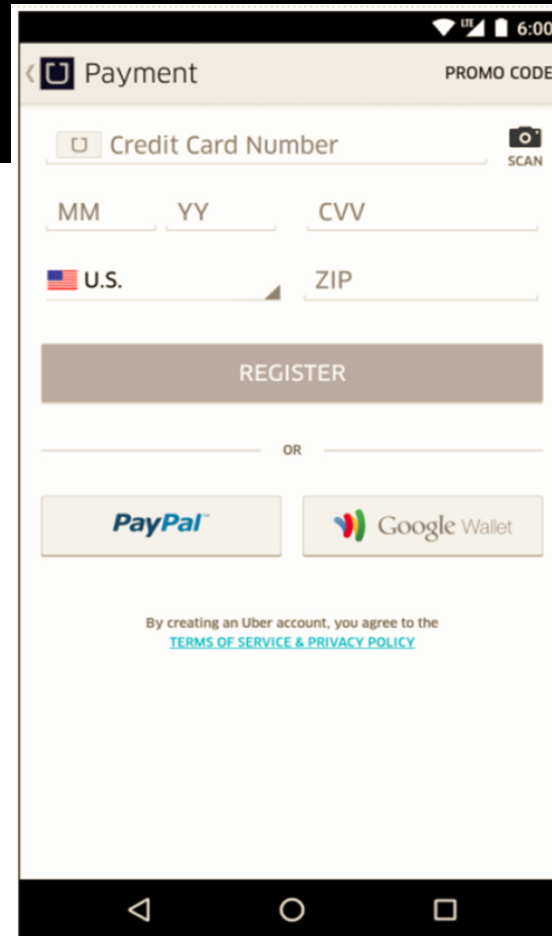
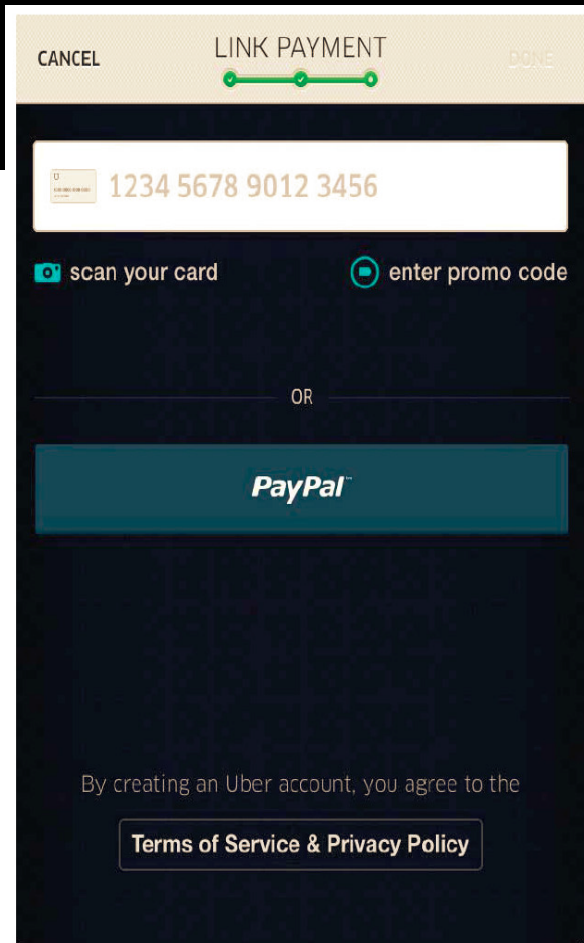
**Place Order**

By placing your order, you agree to [terms of use and arbitration agreement](#).

Promo Code

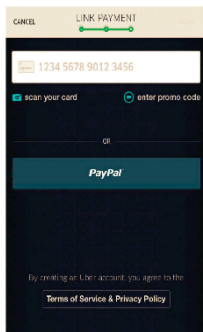
Morgan Lewis



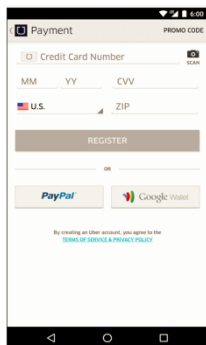


Morgan Lewis

# Battle of the Screens

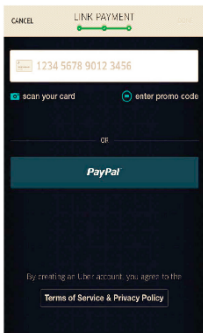


- *Cullinane v. Uber Techs., Inc.*, 2016 WL 3751652 (D. Mass. 2016)
  - Held agreement enforceable
  - Screen gave plaintiffs reasonable notice that their agreement was subject to the terms
  - Signified assent by clicking “done” and using the service

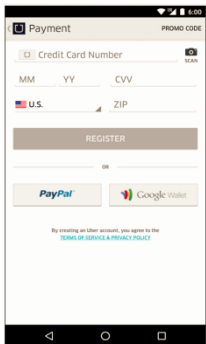


- *Meyer v. Kalanick*, 200 F. Supp. 3d 408 (S.D.N.Y. 2016)
  - Held no agreement formed
  - No “I agree” box and terms of service not prominently displayed = plaintiffs lacked “reasonably conspicuous notice”

## Both Circuits Reversed

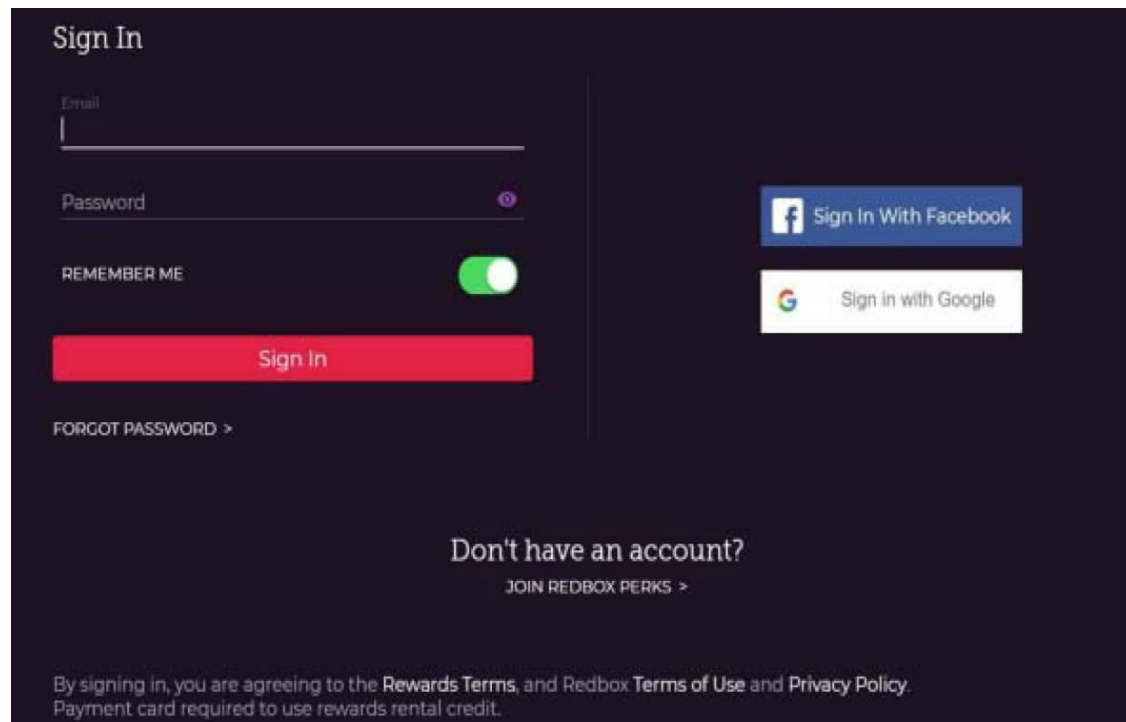


- *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53 (1st Cir. 2018)
  - Held unenforceable
  - Terms only accessible through a hyperlink, but nothing indicated to the consumer that the text was indeed a working hyperlink
  - Hyperlink and accompanying language were not conspicuous enough



- *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”

# Enforceable or unenforceable?



## Lessons from the Battle

- Design a contract formation process that makes the agreement clear
- (1) Consider the contracting method itself
  - Written agreement with signature
  - Scrollwrap
  - Browsewrap
  - Clickwrap
- (2) Content of the “call to action” language
- (3) Placement of the “call to action” language
- (4) Don’t forget about font and style

The background is a dark, almost black, space filled with a complex network of glowing lines and dots. The lines are thin and radiate from various points, creating a sense of depth and movement. The colors of the lines and dots are primarily blue, purple, and red, with some white highlights. The overall effect is reminiscent of a data visualization or a digital landscape.

# Getting the Language Right

Morgan Lewis

# Key Agreements and Terms

- Privacy Policies
  - Important to keep current with GDPR, CCPA, and other state and global requirements
  - Uptick in regulation and litigation
- Terms of Use
  - Warranties
  - Delivery terms
  - Return and refund policies
  - Pricing and payment information
  - Restrictions on use of site
  - Termination of services information
  - IP protections
  - **Dispute resolution** – our focus today

# 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



## Federal Arbitration Act (FAA)

- Applies in state and federal courts to non-maritime transactions involving interstate commerce
- Section 2 is 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”
  - Makes any rule or policy hostile to arbitration unenforceable as a matter of federal law
  - Preserves general contract defenses against arbitration agreements, such as:
    - Fraud
    - Duress
    - Unconscionability

## *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

## Make Terms Consumer-Friendly

- Adding consumer-friendly terms to your agreement heads off unconscionability arguments
  - For example, in *Concepcion*, the Court upheld an agreement including 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)
  - Always anticipate scrutiny and publicity following implementation
  - Consumer groups, press, and the plaintiffs' bar are increasingly sophisticated about the use of arbitration provisions and unafraid to criticize companies that implement them
- A reasoned, risk-calculated approach is better than an unenforceable, broad one
  - If you don't need certain categories of individuals to agree to your waivers, don't make them agree

# 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



# Recent Developments

The background of the slide is a dark, abstract digital landscape. It features a grid of glowing lines in shades of blue, purple, and red that recede into the distance, creating a sense of depth. The lines are punctuated by small, bright dots of the same colors, resembling a data visualization or a network map. The overall effect is futuristic and high-tech.

Morgan Lewis

# The Mass Arbitration Problem

- Starting in 2018, Keller Lenkner and others began filing high volumes of individual arbitration demands
  - Misclassification claims against the gig economy (Uber, Postmates, DoorDash)
  - Quickly spread to consumer claims
    - E.g. more than 15,000 demands against Chegg by a small Baltimore law firm
  - Keller Lenkner claims to have secured more than **\$375 million** in settlements for more than **100,000** individual arbitration clients over **two years**
- Plaintiffs' firms aided by social media harvesting and on-line recruiting

Morgan Lewis

# Initial Responses

- Approach 1: Refuse to pay arbitration fees so that arbitrations can't proceed
  - Not surprisingly, courts have not been receptive (e.g., *Abernathy v. DoorDash*)
  - California has passed a statute to shut down this strategy
- Approach 2: Argue that mass arbitrations violate arbitration provisions against mass claims
  - No traction on this theory yet
  - Issue as to whether court or arbitrator decides
- Approach 3: Try to settle through a class settlement
  - New strategy with limited success unless attorneys in mass arbitrations sign off
    - How do you agree to a class action settlement where class actions are prohibited?
    - Strong opposition by mass arbitration counsel (and potential for high number of opt-outs)

## Now What?

- Modify arbitration provision (but watch out for getting provision voided!)
  - Fee shifting provision or penalties for frivolous/unsupported claim
  - Add provisions to address handling of high number of related claims, e.g., test cases handled before the full filing fee is due, or kick-out clause based on number of claims
  - Re-evaluate what arbitrator decides vis-à-vis court
  - Pre-demand requirements, e.g., requiring potential claimants to provide information or speak with a lawyer at the company before filing an arbitration claim
- Consider early individual settlement offers (and utilize fee-shifting provisions where possible)
- Litigate on a claim-by-claim basis
  - But where? Most vendors cannot handle massive volume
- Accept class action risk

## Recent Trends in Litigation of Online Contracts

- Litigation of electronic contracts has steadily grown over the last decade
- Overall success rate for companies trying to enforce their terms in court was just 60% in 2020
- Successful defense of electronic agreements typically involves:
  - Screenshots
  - Affidavits/declarations
  - Records showing date of acceptance

(Source: Pactsafe, Clickwrap Litigation Trends)

## Recent Trends in Litigation of Online Contracts

- Arbitration clauses and class action waivers more likely to be deemed **enforceable** where:
  - Sign-up box pops up clearly and conspicuously on uncluttered screen
  - Notice of agreement provided in capital letters
  - Hyperlinks are in a darker, bolder font than the rest of the text
  - User required to click box stating she has reviewed agreement and agrees to contract before using website or app

*See, e.g., Capriole v. Uber Techs., Inc.*, 2020 WL 1536648 (D. Mass. Mar. 31, 2020); *Feld v. Postmates, Inc.*, 2020 WL 1047055, at \*7 (S.D.N.Y. Mar. 3, 2020); *Lee v. Ticketmaster L.L.C.*, 817 F. App'x 393 (9th Cir. 2020).

## Recent Trends in Litigation of Online Contracts

- Arbitration clauses and class action waivers more likely to be deemed **unenforceable** where:
  - Hyperlink not highlighted, underlined, in all caps, or in a separate box
  - Screen cluttered by potentially distracting content
  - Notice buried in other text
  - No express language that consumer agrees to be bound
  - Notice too far from assent button

*See Colgate v. JUUL Labs, Inc.*, 402 F. Supp. 3d 728 (N.D. Cal. Aug. 23, 2019); *Arnaud v. Doctor's Associates Inc.*, 18-CV-3703, 2019 WL 4279268 (E.D.N.Y. Sept. 10, 2019).

## Recent Trends in Litigation of Online Contracts

*Kauders v. Uber Techs., Inc.*, 486 Mass. 557 (2021)

- User did not manifest consent where:
  - Notice and hyperlinks on later-appearing screen.
  - Screen dedicated to unrelated topic, e.g., entering payment information.
  - Notice and hyperlinks placed at bottom of screen.
  - Following prompts higher up on screen may result in never seeing notice.
  - Notice less prominent than hyperlinks, downplaying the significance of notice.
  - User not required to scroll through conditions, select them, or affirmatively agree before registering.
  - “Done” button less clear than “I agree” button.



# Session Takeaways

The background features a dark, almost black, space filled with a dense field of vertical lines of varying heights. Each line is topped with a small, glowing dot in shades of blue, purple, and red. The lines themselves are thin and appear to be composed of many small segments, creating a shimmering, digital effect. The overall composition suggests a vast, interconnected network or data landscape.

Morgan Lewis

# Session Takeways

## 1. Get the contract process right

Contract mechanism (browsewrap, clickwrap, hybrid-clickwrap, scrollwrap)  
Call to action language  
Placement, color, size of type

## 2. Get the language right

Mutual  
Scope  
Exception for small claims  
Opt-out?  
Other exceptions (IP infringement exception is a problem)  
Pre-dispute resolution required?  
Arbitration provider  
Filing Info  
Costs  
Location  
Delegation  
If waiver unenforceable, no arbitration  
Applicable law  
Waiver (include in the arbitration clause)  
McGill and public injunctive relief?  
Survival

## 3. Consider changes to address mass arbitration issue

## 4. Stay tuned

**Morgan Lewis**

# Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

**Morgan Lewis**

To help keep you on top of developments as they unfold, we also have launched a resource page on our website at [www.morganlewis.com/topics/coronavirus-covid-19](http://www.morganlewis.com/topics/coronavirus-covid-19)

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple "Stay Up to Date" button.



## Ezra D. Church



**Ezra D. Church**

Philadelphia

+1.215.963.5710

[ezra.church@morganlewis.com](mailto:ezra.church@morganlewis.com)

Ezra D. Church counsels and defends companies in privacy, cybersecurity, and other consumer protection matters. He helps clients manage data security and other crisis incidents and represents them in high-profile privacy and other class actions. Focused particularly on retail, ecommerce, and other consumer-facing firms, his practice is at the forefront of issues such as biometrics, artificial intelligence, location tracking, ad tech, and blockchain. Ezra is a Certified Information Privacy Professional (CIPP) and co-chair of the firm's Class Action Working Group.



## KRISTIN M. HADGIS



**Kristin M. Hadgis**

Philadelphia

+1.215.963.5563

[kristin.hadgis@morganlewis.com](mailto:kristin.hadgis@morganlewis.com)

Kristin M. Hadgis counsels and defends retail and other consumer-facing companies in matters relating to privacy and cybersecurity, class actions, Attorney General investigations and enforcement actions, the California Consumer Privacy Act, consumer protection laws, retail operations, loyalty and gift card programs, and commercial disputes. Kristin also handles data security incident response crisis management, including any resulting litigation or government investigations. Kristin has advised on more than 250 data breaches in her career, counseling clients on how best to give notice to affected individuals or government and consumer reporting entities, following proper compliance protocol. Kristin also represents these companies on any class action and other litigation stemming from the incidents, and instructs them on implementing policies and procedures to prevent and mitigate future breaches.



## MEGAN A. SUEHIRO



**Megan A. Suehiro**

Los Angeles

+1.213.612.7324

[megan.suehiro@morganlewis.com](mailto:megan.suehiro@morganlewis.com)

Megan A. Suehiro's practice focuses on complex business litigation and class action defense. She has experience in all phases of litigation, including fact investigation, discovery, motions practice, and trial. Megan has appeared before state and federal courts, and has second-chaired three bench trials, securing complete judgment on behalf of the client in all three. Megan is a member of the firm's Class Action Working Group, and has experience representing clients in products liability, financial services, and consumer class actions.



## Our Global Reach

Africa

Asia Pacific

Europe

Latin America

Middle East

North America

## Our Locations

Abu Dhabi

Almaty

Beijing\*

Boston

Brussels

Century City

Chicago

Dallas

Dubai

Frankfurt

Hartford

Hong Kong\*

Houston

London

Los Angeles

Miami

Moscow

New York

Nur-Sultan

Orange County

Paris

Philadelphia

Pittsburgh

Princeton

San Francisco

Shanghai\*

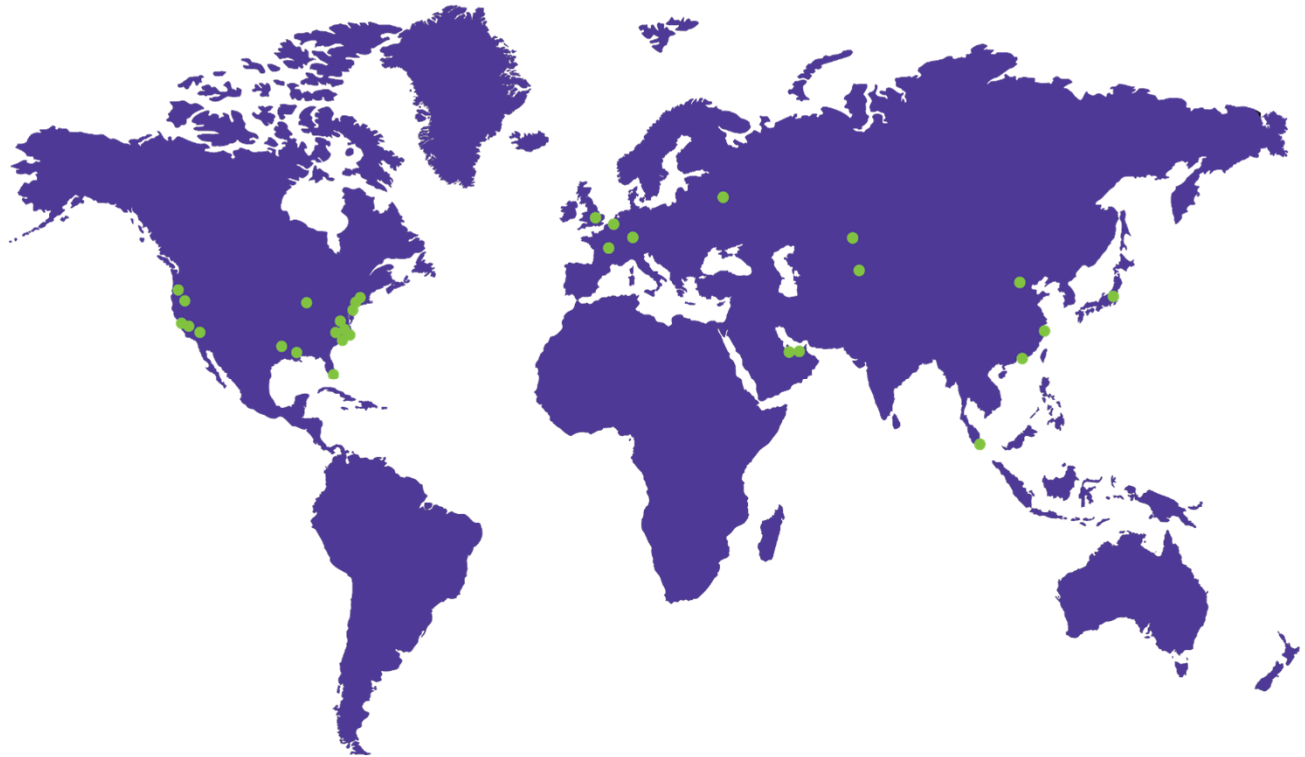
Silicon Valley

Singapore\*

Tokyo

Washington, DC

Wilmington



# Morgan Lewis

Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan, Lewis & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

# THANK YOU

© 2021 Morgan, Lewis & Bockius LLP  
© 2021 Morgan Lewis Stamford LLC  
© 2021 Morgan, Lewis & Bockius UK LLP

Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC378797 and is a law firm authorised and regulated by the Solicitors Regulation Authority. The SRA authorisation number is 615176.

Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP. In Hong Kong, Morgan, Lewis & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong. Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship. Prior results do not guarantee similar outcomes. Attorney Advertising.

**Morgan Lewis**