Browsewrap Arbitration? Enforcing Arbitration Provisions in Online Terms of Service

By Sherman Kahn and David Kiferbaum

Companies that provide services to consumers have often sought to reduce the risk of class action lawsuits by requiring that their customers agree to arbitrate any disputes. Such arbitration agreements may require customers to arbitrate on an individual basis only, with customers being obligated to waive any rights they might otherwise have to pursue claims through class actions. In recent years, many such arbitration provisions, particularly those that included class action waivers, had been held unenforceable under state law contract doctrine.[1] In April 2011, however, the U.S. Supreme Court held in *AT&T Mobility v. Concepcion* that the Federal Arbitration Act preempts most state law challenges to class action waivers, including challenges on grounds of unconscionability.[2] How broadly lower courts will interpret the *Concepcion* decision remains to be seen. For example, on February 1, 2012, the Second Circuit held in *In re American Express Merchants' Litigation* that the *AT&T* decision did not preclude invalidation of an arbitration waiver where the practical effect of enforcement would impede a plaintiff's ability to vindicate his or her federal statutory rights.[3]

Nonetheless, in the wake of *Concepcion*, many companies that provide online products or services to consumers are exploring whether to include an arbitration clause and class action waiver in their online Terms of Service. Moreover, it is increasingly common for business-to-business agreements to be documented based on agreements contained in online Terms of Service. Enforceability of online arbitration agreements is thus likely to be an increasingly important issue both in the commercial and consumer contexts.

Assessing the enforceability of arbitration provisions in online Terms of Service requires two further inquiries:

1. What online contract principles do courts use to determine whether a user of an online product or service has validly agreed to the provisions of an enforceable contract governing his or her use of such product or service?

2. How have courts applied these online contract principles in determining whether online agreements containing arbitration provisions and / or class action waivers may withstand state law challenges to their enforcement?

A. Online Contract Principles

In order to compel arbitration under Section 4 of the Federal Arbitration Act ("FAA"), the moving party "must make a prima facie showing that an agreement to arbitrate existed before the burden shifts to the party opposing arbitration to put the making of that agreement 'in issue.'"[4] Having satisfied this showing, courts then "apply ordinary state-law principles that govern the formation of contracts" in deciding whether the agreement to arbitrate is enforceable.[5]

Courts have struggled to conform "ordinary state-law principles" to agreements in the digital age—for example, agreements presented to consumers over the Internet or through other digital means, or those which, by their terms, are accepted through the continued use of a product or service.[6] Over time, courts began to distinguish between two common types of agreements: "clickwrap" agreements, which digitally present the applicable terms and require consumers to affirmatively indicate their assent, e.g., by checking a box or clicking a button stating "I agree" to such terms prior to permitting the use of a product or service; and "browsewrap" agreements, the terms of which are made available to users on the subject product or service's website, and which provide that users assent to the terms through the users' continued use of the product or service.[7]

> *"Courts have struggled to conform 'ordinary state-law principles' to agreements in the digital age."*

New York courts have held that in either case, the same contract principles apply; to be an enforceable contract, consumers must have reasonable notice of the terms of the agreement, and must manifest assent to those terms. In a landmark 2002 ruling by then-Judge Sotomayor in *Specht v. Netscape Communications Corp.*, the Second Circuit denied Netscape's motion to compel arbitration under a browsewrap software license agreement, holding that users of Netscape's software did not have reasonable notice of the license agreement containing the agreement to arbitrate.[8] As such, plaintiffs have had success in challenging the enforceability of similar browsewrap agreements; conversely, clickwrap agreements that clearly present their terms have more often been held to be enforceable.[9]

Applying these same principles, courts have enforced agreements against plaintiff consumers in scenarios that challenge the clickwrap / browsewrap distinction, such as the Facebook Terms of Use at issue in a January, 2012 case, *Fteja v. Facebook*.[10] There, the Southern District of New York upheld the forum selection clause in Facebook's Terms of Use, which were "click accepted" during registration for the online social network by clicking a

"Sign Up" button that was immediately followed by hyperlinked text providing: "By clicking Sign Up, you are indicating that you have read and agree to the *Terms of Service*."[11] Because the plaintiff user had been "informed of the consequences of his assenting click" by the hyperlinked text (which directed users to the applicable terms), the court deemed such notice "enough" to have resulted in a contract enforceable against Facebook's users.[12] It is possible that courts will extend the reasoning of this decision to a provision providing for arbitration and there is no reason to think that under ordinary state law contract principles, the enforceability of an arbitration agreement should be treated any differently.

"Courts have enforced arbitration provisions contained in online Terms of Service in commercial transactions."

B. Enforcing Online Arbitration Provisions

Courts have enforced arbitration provisions in online Terms of Service agreements where the party sought to be bound clearly assents to the terms and conditions of the agreement.

Courts have enforced arbitration provisions contained in online Terms of Service in commercial transactions. For example, in *Spartech CMD, LLC v. International Automotive Components*, the Eastern District of Michigan upheld an agreement to arbitrate in the online Terms and Conditions governing purchase orders by defendant for plaintiff's chemical products.[13] Because the defendant's electronically submitted purchase orders contained text explicitly referencing the applicability of defendant's online terms governing its purchases, including a URL linking to these terms, the court held that the plaintiff could not claim it lacked notice of the terms, and was bound by the agreement to arbitrate.[14] However, such a determination still hinges on fundamental online contracting principles discussed above; other courts have declined to enforce online agreements governing business-to-business transactions where the online terms mentioned in transaction documents are not made readily accessible by reference to the URL containing the relevant terms.[15]

In the consumer context, courts apply more scrutiny, but have enforced arbitration agreements in online Terms of Service if there is evidence that the consumer consented to the arbitration agreement. In *Blau v. AT&T Mobility*, decided in December 2011, the plaintiff consumers, who were arguing that AT&T Mobility's network was not sufficiently robust to provide the promised level of service, had specifically assented to AT&T Mobility's Terms of Service, which included an arbitration clause.[16] One of the plaintiffs was bound by an e-signature collected by AT&T Mobility at a retail store.[17] He asserted that he was not bound because another user of his account had provided the signature.[18] The court rejected this argument because the user who signed was an authorized user of the plaintiff's account.[19] A second co-plaintiff had accepted the Terms of Service by pressing a button on his mobile phone's keypad; the court held that this acceptance was valid even though the co-plaintiff could not recall whether he had seen the AT&T Mobility Terms of Service.[20]

These principles were extended more explicitly into the online realm in *Vernon v. Qwest Communications Int'l, Inc.*, decided in March 2012, when the District of Colorado granted defendant Internet service provider Qwest's motion to compel arbitration under arbitration and class action waiver provisions of its Subscriber Agreement with the plaintiff Internet service subscribers.[21] The subscribers had enrolled in Qwest's "Price for Life" Internet service by initially placing orders with Qwest over the phone or Internet.[22] When ordering the service over the phone, subscribers were informed of the governing Subscriber Agreement and its availability online; when ordering over the Internet, subscribers were required to click-accept a Terms and Conditions referencing the Subscriber Agreement.[23] In either case, all subscribers were subsequently provided with necessary computer software which, during installation, required click-acceptance of terms referencing the Subscriber Agreement.[24] Furthermore, all subscribers received a "Welcome Letter" informing subscribers of the Subscriber Agreement and the arbitration provision thereunder.[25] Challenging the validity of a $200 fee Qwest imposed under the Subscriber Agreement following plaintiffs' early termination of the "Price for Life" Internet service, plaintiffs argued that (a) they did not assent to the Subscriber Agreement, and (b) the arbitration and class action waiver provisions were "unenforceable, violate[d] public policy, and are unconscionable."[26] Citing *Blau* and *Fteja*, the court found that plaintiffs had ample notice of the existence of the Subscriber Agreement and its arbitration provision; by affirmatively click-accepting terms referencing the Subscriber Agreement, they could not disclaim assent to its terms.[27] Following *Concepcion*, the court rejected plaintiffs' unconscionability arguments.[28]

The enforceability of an arbitration provision becomes more problematic where there is a lack of evidence of affirmative assent to the agreement containing such provision. In *Kwan v. Clearwire Corp.*, decided in December 2011, the Western District of Washington denied the defendant's motion to compel arbitration in a putative class action against Clearwire, an Internet service provider, in connection with allegedly poorly performing modems.[29] Clearwire sought to compel arbitration based on an arbitration provision in its online Terms of Service, to which the plaintiffs, Brown and Reasonover, claimed they had not agreed.[30] The court held that evidentiary hearings were required to determine whether Brown and Reasonover had actually accepted the Clearwire Terms

of Service, as Brown introduced evidence that it was the Clearwire technician who installed her modem who had click-accepted the Terms of Service,[31] and because Clearwire could not produce a record of a click-acceptance for Reasonover, who testified that she had "abandoned" the Clearwire website without click-accepting the Terms of Service.[32]

In New York, the Second Circuit recently affirmed the denial of a motion to compel arbitration in a case where the moving party failed to raise an applicable theory of online contracting at trial that could have established affirmative assent to an arbitration provision in the online agreement. In *Schnabel v. Trilegiant Corp.*, decided on September 7, 2012, the Court considered Trilegiant's motion to compel arbitration in a putative class action against Trilegiant for allegedly deceptive billing practices associated with its enrollment of the plaintiffs in its "Great Fun" online discount service.[33] In the district court, Trilegiant claimed that the plaintiffs had accepted the arbitration provision of its Great Fun Membership Terms and Conditions because, following enrollment in Great Fun, each plaintiff received an email from Trilegiant that referenced the Terms but did not cancel membership in the service after receiving the email. The district court held that this email failed to give the plaintiffs sufficient notice or opportunity for affirmative assent sufficient for the creation of an enforceable agreement to arbitrate.[34]

The Second Circuit's decision affirmed the district court, but suggested that had Trilegient argued differently, it may have prevailed. Trilegiant asserted on appeal that a hyperlink to its Terms and Conditions presented at the time of signup for the Great Fun service—a "hybrid" clickwrap / browsewrap mechanism factually similar to the form of notice and assent upheld in *Fteja*—provided sufficient notice and affirmative assent.[35] However, as Trilegient had failed to raise this "possibly meritorious" theory in the district court, the Second Circuit refused to consider it on appeal.[36]

C. Conclusions

What lessons can be drawn from these decisions? For an arbitration provision contained in an online Terms of Service agreement to be enforceable against a party, there should be clear consent by that party to be bound by the agreement. If the arbitration provision is contained in a passive "browsewrap" Terms of Service, requiring no affirmative consent from the party sought to be bound, whether business or consumer, this may be insufficient—absent other factors—to bind the party with respect to arbitration.

In addition, an online Terms of Service containing an arbitration provision should be presented to counterparties in a reasonably conspicuous manner before they click-accept the Terms of Service; the agreement should not be "submerged" within a series of links, placed on a part of the screen not visible before the customer reaches the "I accept" button (though note, as indicated in *Fteja*, hyperlinked text indicating the consequences of click-acceptance may be sufficient to create a binding contract) or buried in small print at the footer of a long email message. In commercial transactions, online terms containing agreements to arbitrate that are incorporated into purchase orders or price quotes should be explicitly referenced and made readily available via URL.

"For an arbitration provision contained in an online Terms of Service agreement to be enforceable against a party, there should be clear consent by that party to be bound by the agreement."

Service providers should maintain robust records documenting where customers, in particular if the customers are individual consumers, have been notified or have affirmatively agreed to the Terms of Service. For example, a record indicating where and when a user was provided notice of the Terms of Service Agreement may support a service provider's argument that such user had notice of the Terms' existence and thus could be deemed capable of having accepted those Terms. Moreover, a record of users' actual "click-acceptances" of an online Terms of Service agreement incorporating an arbitration provision will substantially improve the likelihood that such agreement (and the incorporated arbitration provision) will be enforced against such users. A click-accept record that is linked to the user who actually click-accepted the agreement is best. Moreover, the Terms of Service agreement should make clear that it applies not only to the individual who originally click-accepted such agreement, but also to other users with the organization agreeing to the service or to whom the individual provides access to his or her account.

Endnotes

1. *See, e.g, Fensterstock v. Educ. Fin. Partners*, 611 F.3d 124 (2d Cir. 2010), *vacated sub nom. Affiliated Computer Servs., Inc. v. Fenterstock*, 131 S. Ct. 2989 (2011) (vacating and remanding judgment in light of *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011)); *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094 (Cal. Ct. App. 2002).
2. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).
3. *In re Am. Express Merchants' Litig.*, 667 F.3d 204 (2d Cir. 2012), *reh'g denied*, 681 F.3d 139, 140 (2d Cir. 2012) (Pooler, J., concurring) (emphasizing that the holding is not governed by *Concepcion*, because "[w]hile *Concepcion* addresses state contract rights, *Amex III* deals with federal statutory rights—a significant distinction.").
4. *See* 9 U.S.C. § 4; *Blau v. AT&T Mobility*, No. C 11-00541 CRB, 2012 U.S. Dist. LEXIS 217, at *9 (N.D. Cal. Jan. 3, 2012) (quoting *Hines v. Overstock.com, Inc.*, 380 F. App'x 22, 24 (2d Cir. 2010)).
5. *Vernon v. Qwest Commc'ns Int'l, Inc.*, No. 09-cv-01840-RBJ-CBS, 2012 U.S. Dist. LEXIS 31076, at *13 (D. Colo. Mar. 8, 2012) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

6. *Cf. Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004) ("While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.").

7. *See id.* at 429-30.

8. *Specht v. Netscape Commc'ns. Corp.*, 306 F.3d 17, 32 (2d Cir. 2002).

9. *See, e.g., Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362 (E.D.N.Y. 2009); *Register.com*, 356 F.3d at 429 (citing *Specht*, 150 F. Supp. 2d at 594); *but see, e.g., Southwest Airlines Co. v. BoardFirst, L.L.C.*, No. 3:06-CV-0891-B, 2007 U.S. Dist. LEXIS 96230, at *20-21 (N.D. Tex. Sept. 12, 2007) (enforcing browsewrap agreement due to party's "actual knowledge" of the agreement's terms).

10. *Fteja v. Facebook, Inc.*, 2012 U.S. Dist. LEXIS 12991 (S.D.N.Y. Jan. 24, 2012).

11. *Id.* at *12.

12. *Id.* at *27.

13. *Spartech CMD, LLC v. Int'l Auto. Components Grp. N. Am., Inc.*, No. 08-13234, 2009 U.S. Dist. LEXIS 13662, at *13-14 (E.D. Mich. Feb. 23, 2009).

14. *Id.*

15. *Cf., e.g., Leica Geosystems, Inc. v. L.W.S. Leasing, Inc.*, No. 10-cv-01813, 2012 U.S. Dist. LEXIS 75174, at *16-17 (D. Colo. May 31, 2012) (holding that plaintiff could not enforce its online terms against defendant, because, distinguishing this case from *Spartech*, plaintiff's price quotes containing an explicit reference to its "Standard Terms and Conditions of Sale" at issue "do not explicitly define Leica's Standard Terms nor do they provide a link to the internet address where Leasing could review these terms…party cannot agree to terms that are not included in or made available through the offer.").

16. *Blau*, 2012 U.S. Dist. LEXIS 217, at *13-14.

17. *Id.* at *9.

18. *Id.* at *9-10.

19. *Id.* at *10-11.

20. *Id.* at *11-13.

21. *Vernon v. Qwest Commc'ns Int'l, Inc.*, No. 09-cv-01840-RBJ-CBS, 2012 U.S. Dist. LEXIS 31076 (D. Colo. Mar. 8, 2012).

22. *Id.* at *25-30.

23. *Id.* at *21-23.

24. *Id.* at *23.

25. *Id.* at *25.

26. *Id.* at *5.

27. *Id.* at *34-41.

28. *Id.* at *56-59.

29. *Kwan v. Clearwire Corp.*, No. C09-1392JLR, 2011 U.S. Dist. LEXIS 150145 (W.D. Wash. Dec. 28, 2011).

30. *Id.* at *1-5, 14.

31. *Id.* at *28-29.

32. *Id.* at *32-33.

33. *Schnabel v. Trilegiant Corp.*, No. 11-1311-CV, 2012 WL 3871366 (2d Cir. Sept. 7, 2012).

34. *Id.* at 13-14, 35 ("We do not think that an unsolicited email from an online consumer business puts recipients on inquiry notice of the terms enclosed in that email and those terms' relationship to a service in which the recipients had already enrolled, and that a failure to act affirmatively to cancel the membership will, alone, constitute assent.").

35. *Id.* at 41 n.18.

36. *Id.* at 40-43 ("The accessibility of the arbitration provision from a hyperlink on the enrollment screen, as appears to have been the case here, might have created a substantial question as to whether the provision was a part of a contract between the parties. The issue is not before us, however. Trilegiant forfeited the argument by not raising it in the district court.… Trilegiant's inability to raise a possibly meritorious argument as to why it is contractually entitled to an arbitration on the plaintiffs [sic] claims is not, in our view, a 'manifest injustice.'")

Sherman Kahn, skahn@mofo.com, is of-counsel with the New York office of Morrison & Foerster LLP and vice-chair of the Dispute Resolution Section of the New York State Bar Association.

David Kiferbaum, dkiferbaum@mofo.com, is an associate with the New York office of Morrison & Foerster LLP.

Like what you're reading? To regularly receive issues of the *New York Dispute Resolution Lawyer*, join NYSBA's Dispute Resolution Section (attorneys only).