

Uber: The Turning of the Tide

By Thomas A. Dickerson and Sylvia O. Hinds-Radix

The juggernaut, Uber Technologies, Inc., may have reached the end of its worldwide efforts to dominate new transportation markets with its unique and popular ride-hailing app.¹ Although Uber has met opposition in the past in both the marketplace² and in court, particularly in California,³ new developments in China and in New York City may have brought Uber's nearly unstoppable advance to a halt.

Uber Surrenders In China

It is fair to state that Uber and its co-founder, Travis Kalanick, wanted very much to succeed in China. "Despite intense local competition, the market was one of Uber's largest by total number of rides. A Chinese operation was the personal project of...Kalanick, who traveled regularly to the country and gave speeches that borrowed the jargon of Chinese Communist Party officials. His interest was backed up by billions of dollars in investment."⁴ But Uber, "known globally for competing ruthlessly against all comers,"⁵ waived the white flag and surrendered by selling Uber China to Didi Chuxing, its toughest rival.⁶ Uber thereby joins other American economic armadas such as Facebook, Google and Amazon that have sailed to China on their quest for "world domination," only to eventually withdraw. "Like an imperial armada rolling out from North America's West Coast, these companies would try to establish beachheads on every other continent. But when American giants tried to enter the waters of China, the world's largest Internet market, the armada invariably ran aground."⁷

Price-Fixing Conspiracy

Uber is very popular in New York City and elsewhere,⁸ having captured a significant portion of the taxis, cars for hire and mobile-app-generated ride-share services markets.⁹ However, a recently filed lawsuit, *Meyer v. Kalanick*,¹⁰ presently before federal Judge Jed Rakoff of the Southern District of New York, alleges that Travis Kalanick and Uber are stifling price competition amongst Uber drivers to the detriment of Uber riders in violation of Section 1 of the Sherman Antitrust Act and New York's antitrust statute, General Business Law 340 (Donnelly Act), which presents a real challenge to Uber.

The Uber Algorithm

In a technologically modern variation of resale price maintenance, the court noted in denying defendants' motion to dismiss¹¹ [and sustaining the causes of action based upon both horizontal and vertical price restraints] that drivers using the Uber app do not compete on price and cannot negotiate fares with drivers for rides. Instead, drivers charge the fares set by the Uber algo-

rithm. Though Uber claims to allow drivers to depart downward from the fare set by the algorithm, there is no practical mechanism by which drivers can do so. The court also noted that "Plaintiff alleges that the drivers have a 'common motive to conspire' because adhering to Uber's pricing algorithm can yield supra-competitive prices...and that if the drivers were acting independently instead of in concert, 'some significant portion' would not agree to follow the Uber pricing algorithm."

Remember Ralph Nader?

Defendants, evidently, attempted to discover information with which to discredit the Plaintiff, Spencer Meyer and his attorney. This effort, reminiscent of General Motors' attempt to discredit Ralph Nader after the publication of his bestselling book, *Unsafe at Any Speed*, in 1965,¹² backfired and led to Judge Rakoff's order enjoining defendants, Uber and Kalanick, from using any information gathered by the private investigator they hired, in any manner whatsoever. "It is a sad day when, in response to the filing of a commercial lawsuit, a corporate defendant feels compelled to hire unlicensed private investigators to conduct secret personal background investigations of both the plaintiff and his counsel. It is sadder yet when these investigators flagrantly lie to friends and acquaintances of the Plaintiff and his counsel in an (ultimately unsuccessful) attempt to obtain derogatory information about them."¹³

Uber's Arbitration Clauses

In response to several class action lawsuits filed against it, Uber has sought to enforce mandatory arbitration clauses and class action waivers appearing in its driver agreements.¹⁴ Such clauses have become quite common in consumer and employee contracts since the U.S. Supreme Court's decision in *AT&T Mobility v. Concepcion*¹⁵ and in subsequent decisions.¹⁶ Initially Uber's efforts were rejected by federal Judge Edward M. Chen of the Northern District of California in *Mohamed v. Uber Technologies, Inc.*¹⁷ and *Gillette v. Uber Technologies, Inc.*,¹⁸ finding unenforceable Uber's earlier version of its mandatory arbitration clause. However, after some modifications by Uber, a new driver agreement containing a

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mandatory arbitration clause was approved by federal Judge James S. Moody of the Middle District of Florida in *Suarez v. Uber Technologies, Inc.*¹⁹ and by federal Judge Marvin J. Garbis of the District of Maryland in *Varon v. Uber Technologies, Inc.*²⁰

Internet Arbitration Clauses

One of the more ominous developments for e-commerce consumers and employees agreeing to be hired through the Internet involves the increasing enforcement by the courts of onerous contractual terms and conditions, such as mandatory arbitration, forum selection and choice of law clauses, class action waivers and liability disclaimers, often lurking in hyperlinks.²¹ As noted by Judge Rakoff, “Since the late eighteenth cen-

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tury, the Constitution of the United States (has) guaranteed U.S. citizens the right to a jury trial. This most precious and fundamental right can be waived only if the waiver is knowing and voluntary.... But in the world of the Internet, ordinary consumers are deemed to have regularly waived this right, and, indeed, to have given up their access to the courts altogether, because they supposedly agreed to lengthy ‘terms and conditions’ that they had no realistic power to negotiate or contest and often were not even aware of. This liberal fiction is sometimes justified, at least where mandatory arbitration is concerned, by reference to the ‘liberal federal policy favoring arbitration.’”²²

Inadequate Notice

Relying upon California law and applying the reasoning of then-Circuit Judge Sonia Sotomayor writing for the majority in *Spreck v. Netscape Communications Corp.*,²³ Judge Rakoff stated, “Applying (California) law, the Spreck court found that certain plaintiffs had not assented to a license agreement containing a mandatory arbitration clause because adequate notice and assent were not present on the facts of that case.” After carefully reviewing cases analyzing “clickwrap” and “browserwrap” agreements, Judge Rakoff distinguished *Mohamed v. Uber*²⁴ and *Cullinane v. Uber*²⁵ and held that “Plaintiff Meyer did not have ‘[r]easonably conspicuous notice’ of Uber’s User Agreement, including its arbitration clause or evince ‘unambiguous manifestation of assent to those terms.’”

Endnotes

1. See Dickerson & Hinds-Radix, *Apartments and Car Sharing: A Disruptive Internet Revolution*, N.Y.L.J. (August 12, 2014); Dickerson & Cohen, *Taxis and Ride-Sharing: Meeting New York City’s Car Service Needs*, N.Y.L.J. (7/30/2015); Dickerson & Hinds-Radix, *Airbnb and Uber: From Revolution to Institution*, N.Y.L.J. (4/22/2016).
2. In some cities Uber has been banned. For example, Uber is banned in St. Louis, Missouri. As a result Uber filed an “antitrust lawsuit [Wallen v. St. Louis Metropolitan Taxicab Commission (E.D. Mo. 2015)] against the St. Louis Metropolitan Taxicab Commission (MTC)...alleging defendants conduct constitutes an illegal combination in violation of Section 1 of the Sherman Antitrust Act” [Goldfein & Keyte, *Uber Seeks Antitrust Scrutiny of Taxicab Commission*, N.Y.L.J. (11/10/2015)]. In other cities Uber is tolerated but subjected to an occasional riot. See Steinmetz, *Violent massive street fighting in Jakarta over Uber and Grab taxi services*, www.eturbonews.com (3/22/2016); Nairobi’s taxi drivers turn to violence to halt Uber, www.eturbonews.com (1/28/2016).
3. See e.g., *O’Connor v. Uber Technologies, Inc.*, 2015 WL 5138097 (N.D. Cal. 2015) (Uber drivers presumptive employees; class certification granted); *Ehret v. Uber Technologies, Inc.*, 2015 WL 7759464 (N.D. Cal. 2015) (withholding gratuities; class certification granted); *Philliben v. Uber Technologies, Inc.*, Case No. 3-14-cv-05615-JST, Stipulation of Settlement (N.D. Cal.) (safe ride fees class action proposed settlement of \$28.5 million); *Cotter v. Lyft, Inc.*, Case No. 13-cv-04065-VC (N.D. Cal.) (drivers claim they are employees; rejection of proposed \$12.25 settlement); (add Uber DAs settlement proposal); and Kendall, *Uber Settles Suit Over Airport Fees*, www.therecorder.com (11/20/2015) (proposed \$1,785,913 settlement to “reimburse riders for ‘airport fee tolls’”).
4. Mozur & Issac, *Uber to Sell to Rival Didi Chuxing and Create New Business In China*, www.nytimes.com (8/1/2016).
5. *Id.*
6. *Id.*
7. Manjoo, *Even Uber Couldn’t Bridge the China Divide*, www.nytimes.com (8/1/2016).
8. See *Meyer v. Kalanick*, 2016 WL 1266801 (S.D.N.Y. 2016) (“Plaintiff alleges that Uber competes in the ‘relatively new mobile app-generated ride-share service market’ of which Uber has an approximately 80 percent market share...Lyft has only a 20 percent market share...Although, plaintiff contends, neither taxis nor traditional cars for hire are reasonable substitutes for mobile app-generated ride-share service, Uber’s own experts have suggested that in certain cities in the U.S., Uber captures 50 percent to 70 percent of business customers in the combined market of taxis, cars for hire and mobile-app generated ride-share services”).
9. See Joshi, *Taxis: Yellow, Green and Black: Competition & Evolution*, City Law, New York Law School, Vol. 21, No. 3 (May/June

2015). There are many ride-hailing companies in New York City including “Uber, Lyft, Gett, Hailo, Curb, Way2Ride, Ride Ling, Bandwagon.”

10. *Meyer v. Travis Kalanick And Uber Technologies, Inc.*, 2016 WL 4073071 (S.D.N.Y. 2016).
11. *Id.* See also; Dickerson & Hinds-Radix, *Airbnb and Uber: From Revolution to Institution*, N.Y.L.J. (4/22/2016).
12. See http://en.wikipedia.org/wiki/Ralph_Nader (“The book became an immediate bestseller but also prompted a vicious backlash from General Motors (GM) who attempted to discredit Nader by tapping his phone in an attempt to uncover salacious information and, when that failed, hiring prostitutes in an attempt to catch him a compromising situation...GM CEO James Roche who admitted, when placed under oath, that the company had hired a private detective agency to investigate Nader”).
13. *Meyer v. Travis Kalanick and Uber Technologies, Inc.*, 2016 WL 3981369 (S.D.N.Y. 2016).
14. See Godoy, *Uber Driver Contract Row Raises Consent Issues*, Judge Says, www.law360.com (8/2/2016) (“A Brooklyn federal judge overseeing two proposed class actions by drivers claiming Uber is skirting labor laws questioned Tuesday whether frequently requiring drivers to agree to new contracts could undermine their consent to the agreements. U.S. District Judge Nicholas G. Garafis heard arguments on motions by (Uber) to dismiss the suits and compel the drivers to enter arbitration”).

The cases are *Ogunmokun v. Uber*, Case Co: 1:15-cv-06143 (E.D.N.Y.) and *Ortega v. Uber*, Case No: 1:15-cv-07387 (E.D.N.Y.).

15. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011).
16. See Dickerson & Chambers, *Challenging ‘Concepcion’ in New York State Courts*, N.Y.L.J. (December 29, 2015).
17. *Mohamed v. Uber Technologies, Inc.*, 109 F.Supp.3d 1185 (N.D. Cal. 2015).
18. *Id.*
19. *Suarez v. Uber Technologies, Inc.*, 2016 WL 2348706 (M.D. Fla. 2016).
20. *Varon v. Uber Technologies, Inc.*, 2016 WL 1752835 (D. Md. 2016), reconsideration denied 2016 WL 3917213 (D. Md. 2016).
21. See Dickerson & Berman, *Consumers’ Loss of Rights in the Internet Age*, NYSBA Journal (October 2014).
22. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011).
23. *Spreck v. Netscape Communications Corp.*, 306 F.3d 17, 35 (2d Cir. 2002)(“[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestations of assent to those terms by customers are essential if electronic bargaining is to have integrity and credibility”). See also *Berkson v. GOGO LLC*, 97 F. Supp. 3d 359 (E.D.N.Y. 2015).
24. *Mohamed*, 109 F. Supp. 3d 1185
25. *Cullinane v. Uber Technologies, Inc.*, 2016 WL 3751652 (D. Mass. 2016).

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