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SECOND CIRCUIT REVIEW

Expert Analysis

Contracting in the Digital Age: The Second Circuit and Arbitration Clause Enforceability

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Whether using a smartphone app, downloading music, or buying a product online, we have all agreed to be bound by contracts containing arbitration clauses. The ubiquity of these clauses notwithstanding, these clauses have generated a fair bit of controversy in recent years. Arbitration clause enforceability has become a commonly litigated issue, and, over the past year and a half, the Second Circuit, along with the Southern District of New York, have issued three important decisions interpreting arbitration clause enforceability in both the consumer and employment contexts.

At first glance, these decisions all seem to turn on practical considerations. The opinions carefully track factors like the prominence of the arbitration clause and its location. But arbitration enforceability is not merely an empirical inquiry. In fact, the recent opinions analyze these practical factors to underscore a more fundamental judicial concern: preserving the integrity of contractual bargaining. The central issue is whether there was evidence of a legitimate "meeting of the minds" between the two parties to the contract.

'Nicosia'

The first case, *Nicosia v. Amazon*, 834 F.3d 220 (2d Cir. 2016), involved an Amazon online customer who had used the website to purchase 1 Day Diet, a weight loss drug. The drug contained sibutramine—a Schedule IV stimulant that the U.S. Food and Drug Administration withdrew from the market in 2010 after it recognized the drug's association with cardiovascular risks and strokes. Amazon stopped selling 1 Day Diet when it learned that the drug contained sibutramine, but it never notified Nicosia that the product contained sibutramine or offered to refund his purchase.

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Nicosia brought a putative class action against Amazon, alleging that Amazon had sold and was continuing to sell unregulated weight loss products containing sibutramine to consumers in violation of the Consumer Product Safety Act (CPSA) and state consumer protection laws.

Relying on a declaration of a paralegal in its legal department, Amazon moved to dismiss Nicosia's complaint, claiming that Nicosia had agreed to be bound by a mandatory arbitration clause.

The Second Circuit's decision, authored by Judge Denny Chin and joined by Judges Robert D. Sack and Ray Lohier, held that the district court incorrectly dismissed Nicosia's complaint based on the arbitration agreement at issue. The court's analysis focused on examining the mechanics of the user contract in question. The opinion detailed the practical distinctions between "clickwrap" agreements, which "typically require[] users to click an 'I agree' box after being presented with a list of terms or conditions of use," and "browsewrap" agreements, which "involve terms and conditions posted via hyperlink, commonly at the bottom of the screen." Id. at 233. The court noted that the controlling legal standard for evaluating the enforceability of an arbitration clause is "whether

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the design and content of that webpage rendered the existence of terms reasonably conspicuous." Id.

The court described the online interface in considerable detail. "Near the top of the page, below the 'Review your order' heading, the critical sentence appears in smaller font: 'By placing your order, you agree to Amazon.com's privacy notice and conditions of use.'" Id. at 236. The phrase "FREE Two-Day Shipping" showed up "four times in the center of the page, appearing in orange, green, and black fonts, and in white font against an orange banner." Id. In contrast, the phrase "'By placing your order, you agree to Amazon.com's … conditions of use'—is not bold, capitalized, or conspicuous in light of the whole webpage." Id. at 237.

For all of its discussion of text color and font size, the opinion also made a more fundamental point: Certain types of online contracts do not demonstrate manifestation of mutual assent. The court underscored that "[m]anifestation of mutual assent to an online contract is not meaningfully different" from traditional contract law, and held that clickwrap agreements "are certainly the easiest method of ensuring that terms are agreed to." Id. at 232, 238. The court emphasized that the details about the Web interface all matter because they demonstrate the likely state of mind of the consumer at the time of contracting, and whether she knowingly consented to be bound in contract.

'Meyer'

In a district court case decided around the same time, Judge Jed Rakoff reasoned in much the same manner. The case *Meyer v. Kalanick*, No. 15 CIV. 9796, 2016 WL 4073071 (S.D.N.Y. July 29, 2016), involved Uber's user agreement. This animated opinion, on the one hand, examined the user interface of the contract at issue in close detail. On the other hand, its more fundamental point was that contract interfaces in which terms are "accessible only via a small and distant hyperlink" contravene long-accepted contract formation principles—namely, mutual assent. Id. at *10.

'McAllister'

The Second Circuit decided a third arbitration case—this time, in the employment context. In *McAllister v. East*, 611 F. App'x 17 (2d Cir. 2015), pro se plaintiff McAllister brought a discrimination suit against her employer, who moved to compel arbitration on the basis of a clause included in the employer's employee handbook. On appeal, McAllister argued that she had no recollection of ever receiving or opening emails that had contained the employee handbook.

In a brief summary order, Judges Pierre Leval, Rosemary Pooler, and Barrington Parker held that the employment arbitration clause was enforceable. Though the contract principle of "mutual assent" was not explicitly invoked by name, the decision considered factors demonstrating that McAllister had the requisite mental state to contract. Specifically, the court considered the fact that McAllister continued to work for 15 years following the publication of the new employee handbook, and that screenshots showed she had electronically accepted the employee handbook and read an email in which it was contained. Just like the discussion of text and link placement in the two consumer cases, these factors in *McAllister* were used to evaluate whether the plaintiff mentally assented to enter into contract—a fundamental requirement of contract law.

Litigating and deciding these cases will likely involve detailed review of tools for user assent and Web interfaces—a task that most lawyers probably never envisioned undertaking when they chose to go to law school.

CFPB Guidance

Though there have only been a few cases to address this issue, their recent timing may signal growing involvement of the legal community in setting the bounds for arbitration enforceability. Last May, the Consumer Financial Protection Bureau (CFPB) released a proposed rule that would prohibit companies from including in their contracts arbitration clauses that prevent consumers from participating in class-action litigation. Arbitration Agreements (proposed May 5, 2016) (to be codified at 12 CFR pt. 1040). In a strongly worded press release, the CFPB expressed the view that these arbitration clauses allow companies to "sidestep the legal system, avoid accountability, and continue to pursue profitable practices that may violate the law and harm countless consumers." Consumer Financial Protection Bureau, "CFPB Proposes Prohibiting Mandatory Arbitration Clauses that Deny Groups of Consumers their Day in Court," May 5, 2016, available at www.consumerfinance.gov.

Given that guidance, lawyers might expect increased litigation on this issue in the near future. As the opinions discussed above show, litigating and deciding these cases will likely involve detailed review of tools for user assent and Web interfaces—a task that most lawyers probably never envisioned undertaking when they chose to go to law school. But underlying the empirical analysis rests an effort on the part of courts to ensure that online contract principles are consistent with traditional contract doctrine. As Judge Rakoff stated: "At bottom, what is at stake is the 'integrity and credibility' of 'electronic bargaining.'" *Meyer*, 2016 WL 4073071 at *10 (citation omitted).