Click, Agree & Surrender

The power of mandatory arbitration

by: Greg Goldberg, BTA General Counsel

One of the great ironies of modern business is that the more seamless transactions become, the more complicated their legal underpinnings tend to be. A century ago, a shopkeeper might have sealed a deal with a handshake — not exactly a practical option today where the buyer may be clutching a smartphone and the seller may be a website. Modern transactions are mediated by layers of code, hyperlinks and what lawyers like me affectionately call "terms and conditions (Ts & Cs)," a dense thicket of prewritten rules governing everything from refunds to remedies. A key and potentially potent term included in many Ts & Cs is the mandatory arbitration agreement.

In simple terms, mandatory arbitration is a private justice system designed to be more efficient, less cumbersome and less expensive than traditional litigation. An enforceable mandatory arbitration agreement means that even if you end up in a business dispute, you will not end up in court. Instead, you will go before an arbitrator (often, a retired judge), whose job is to hear both sides and issue a decision that is usually final, binding and far more difficult to appeal. Businesses generally favor arbitration because it is more predictable and less risky than appearing before a judge. Considering most consumers never read website Ts & Cs, they can be caught off guard when businesses seek to enforce mandatory arbitration agreements.

Thanks, in part, to the proliferation of lucrative consumer class action lawsuits in the United States, the gap between clicking "Add to Cart" and "Pay Now" has become fertile ground for legal challenges. In that space is where consumers — knowingly or not — typically agree to Ts & Cs. The legal dispute, therefore, centers around whether courts will enforce mandatory arbitration provisions that most consumers never read. The corresponding burden falls upon businesses to establish that Ts & Cs are not only conspicuous, but that they also obtain informed consent from consumers.

Recently, a federal court in the Southern District of California confronted this very question. A business had done what many retailers do — it placed its Ts & Cs behind a hyperlink near a prominent "Pay Now" button, trusting that the combination of proximity and digital convention would be enough to bind customers to everything inside, including a mandatory agreement to arbitrate. There, the court acknowledged that the button was conspicuous, but conspicuousness by itself was not sufficient to create informed consent. Specifically, the website had failed to present its Ts & Cs in a way that made the mandatory arbitration agreement unmistakably clear. The result was a humbling reminder that even the most professionally designed websites can falter under the scrutiny of contract law.

The broader lesson for businesses — especially those that depend heavily on e-commerce — is that enforceability is not a matter of magic words, but of method. A mandatory arbitration clause, no matter how elegantly drafted, is only as strong as the process by which customers agree to it. And courts are increasingly demanding more transparency to account for prevailing consumer habits of blindly clicking "I Agree" or failing to opt out.

So, what makes an online arbitration agreement enforceable? At the risk of oversimplification, the touchstones of enforceability are notice and assent. The customer must be given clear notice of the Ts & Cs and must perform some act — usually a click — that unambiguously signals agreement. Designs that rely on inert silence ("By using this website, you agree ... ") or that bury terms beneath an undifferentiated blizzard of text and links are increasingly vulnerable. The gold standard, according to recent decisions, is the so-called "clickwrap" approach, which presents the Ts & Cs plainly, requires the user to check a box affirming that they have been read and makes that affirmation a condition of completing the transaction. Anything less invites doubt — and, potentially, litigation.

If all of this sounds onerous, that is because it is. But it is also avoidable. Website design is, after all, as much an expression of a company's risk tolerance as it is an expression of aesthetics. And while no one imagines customers eagerly poring over arbitration clauses before buying toner cartridges, the law still insists that agreements — particularly those that strip people of the right to go to court — must be the product of genuine, demonstrable assent. If your business relies on online Ts & Cs to channel disputes to arbitration, now is an excellent time to revisit them. Examine not only the language of your Ts & Cs, but the choreography of your customers' clicks. Ensure that consent is not merely assumed, but captured — clearly, conspicuously and conclusively. ■

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