

## Corporate Litigation

### Second Circuit Issues Important Decision Strengthening the Enforceability of Digital Arbitration Agreements

**Action Item: Businesses utilizing web or smart phone app-based contractual terms containing arbitration clauses accessed by hyperlink should ensure that the link is reasonably conspicuous, and that the user is prompted to read the terms and unambiguously signal his acceptance.**

In a decision that will have major implications on the vitality of digital arbitration pacts, on August 17, 2017, in *Meyer v. Uber Technologies, Inc.*, Nos. 16-2750-cv, 16-2752-cv, the United States Court of Appeals for the Second Circuit held that an arbitration provision that car ride service company, Uber Technologies Inc. (“Uber”) wrapped into the hyperlink-accessible terms and conditions of service accepted by people who registered with Uber was enforceable. Significantly, the court enforced the provision even though the user could register with Uber without having to click on the hyperlink and scrolling through the terms and conditions of service.

#### Background

To start using Uber as a passenger one must install a smart phone application and register with the service by creating an account. In October 2014, Spencer Meyer did so on his Samsung Galaxy S5 phone. As part of the app-based

registration process, Meyer inputted information on successive screens titled “Registration” and “Payment.” The Payment screen included black text advising users that “[b]y creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY.” The capitalized phrase, which was bright blue and underlined, was a hyperlink that, when clicked, took Meyer to a third screen containing a button that, in turn, when clicked, displayed the current version of Uber’s Terms of Service and Privacy Policy. The Terms of Service included a “Dispute Resolution” clause, which provided in relevant part that the user and the company agreed that “any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof...be settled by binding arbitration.” The clause explicitly stated that “*You acknowledge and agree that you and Company are each waiving the right to a trial by jury or to participate as a plaintiff or class User in any purported class action or representative proceeding.*” To complete the registration process, Mayer had to click a button marked “REGISTER” in the middle of the Payment screen. However, whether or not to read the Terms of Service was Meyers’ prerogative. Meyer was able to complete the registration process without ever clicking on the hyperlink.

On December 16, 2015, Meyer, filed a class action complaint in the U.S. District Court for the Southern District of New York against Uber’s CEO Travis Kalanick (to which Uber was later joined), alleging that the Uber app allowed its drivers to fix prices amongst themselves in violation of Federal and New York state antitrust laws. When Uber moved to compel arbitration based on the Dispute Resolution clause, District Judge Jed S. Rakoff denied the motion, concluding that the notice was not reasonably conspicuous and that Meyer did not unambiguously manifest assent to Uber’s Terms of Service when he registered.

On August 17, 2017, in a unanimous decision penned by Judge Denny Chin, the Second Circuit reversed and held that the arbitration clause was enforceable. Applying California state law to determine whether an agreement to arbitrate was formed, the court rejected the notion that the fact that the Terms of Service were available only by hyperlink precluded a determination of reasonable notice. Acknowledging that the enforceability of a web-based agreement was a fact-intensive inquiry, the court held that the notice provided was reasonable as a matter of California law because of the uncluttered design and language of the Payment Screen. Moreover, the warning that “By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY,” followed by the hyperlink, appeared directly below the buttons for registration. Thus, the user did not need to scroll beyond what was immediately visible to find the language informing him

that he was accepting the terms. The court determined that a reasonably prudent smartphone user would know that text which is highlighted in blue and underlined is hyperlinked to another webpage where additional information will be found. Recognizing that many users would not bother reading the additional terms, the court noted that that would be a choice the user makes; but the user would still be on inquiry notice. Accordingly, the court found that Meyer was on notice of the arbitration provision by virtue of the hyperlink to the Terms of Service on the Payment screen. In light of the objectively reasonable notice of the terms, the court held that Meyer unambiguously manifested his assent to the agreement by clicking the “REGISTER” button, i.e., the mechanism for manifesting assent.

### Conclusion

*Meyer v. Uber Technologies, Inc.* strengthens the enforceability of online and app-based arbitration contracts, and provides valuable instructions on how to ensure such contracts’ enforceability. The Second Circuit’s decision suggests that best practice should entail, at a minimum, ensuring (1) that the link to the terms and conditions containing the arbitration clause is **reasonably conspicuous**, and (2) that the registration (or analogous) process include a **clear prompt** directing users to read the terms and conditions, along with an **unambiguous mechanism** signaling that their acceptance of the benefit of registration would be subject to the contractual terms.

**For more information, please contact:**

**Jonathan A. Loeb**

**424.239.3422 | [JLoeb@BlankRome.com](mailto:JLoeb@BlankRome.com)**

**Martin S. Krezalek**

**212.885.5130 | [MKrezalek@BlankRome.com](mailto:MKrezalek@BlankRome.com)**