

Crafting Enforceable Electronic Agreements: EDNY Examines Arbitration Clause in ‘Sultan v. Coinbase’

by Steve Kramarsky

Readers of this column will be aware that courts in the Second Circuit have had a complicated relationship with web-based contracts, and in particular with the idea of electronic consent to arbitration. Today, the vast majority of day-to-day commercial activity takes place through web-based services or applications (regardless of the complexity of the transaction or the sophistication of the parties) and in that environment online and electronic agreements have become ubiquitous. At this point, it would be difficult for an average person to get through a day without agreeing, in one way or another, to be bound by an agreement they have likely never seen or read.

Applying traditional contractual principles to increasingly non-traditional forms of agreement has presented a challenge to the courts. Generally, the fundamental question in a contractual dispute is whether both parties have manifested an intent to be bound by the terms of the agreement. But in what sense can a party manifest the intent to be bound by a contract they have never seen?

The answer—for a wide variety of agreements—comes from the doctrine of inquiry notice. Under that doctrine, courts consider whether a reasonable person would have notice that they were entering into a contract, sufficient to cause them to inquire into its specific terms. If so, the user is deemed to have done so (even if no one actually does). In the web or application context, the question is whether the user interface, as actually presented, sufficiently provides that notice.

Obviously, this is a highly fact-specific inquiry with few bright-lines rules. Two recent Second Circuit cases, *Nicosia v. Amazon.com* and *Meyer v. Uber Technologies*, demonstrate that principle by reaching opposite results as to whether users were on inquiry notice that they had agreed to mandatory arbitration provisions—one in Amazon’s terms of service and the other in Uber’s. A recent opinion from the Eastern District of New York explored the principles set forth in those cases, and it offers some good guidance for anyone trying to design an enforceable electronic contract process.

Sultan v. Coinbase

On Jan. 24, 2019, Judge Frederic Block of the Eastern District of New York issued an opinion in *Sultan v. Coinbase*, interpreting the Second Circuit’s mixed guidance on the subject of electronic agreements to arbitrate. In *Sultan*, the court granted a motion to compel arbitration of a dispute between Coinbase and

one of its user's "pursuant to a mandatory arbitration clause in [Coinbase's] user agreement." 354 F. Supp. 3d 156 (E.D.N.Y. 2019). The court held that Coinbase's account creation process put its users on "inquiry notice" of the terms and conditions of the Coinbase user agreement, to which they agreed upon creation of their accounts. It therefore held that the agreement, with its mandatory arbitration clause, was enforceable under New York law.

Background: Coinbase, Its User Agreement, and the Dispute.

Coinbase is "an online exchange for digital currencies like Bitcoin." Coinbase's platform allows users to transfer funds from their bank account and use those funds to buy an assortment of supported cryptocurrencies. It also provides a digital "vault" in which users can store and protect their digital funds. According to its website, Coinbase has over 20 million customers in 42 countries and has processed over \$150 billion in cryptocurrency transactions.

In May 2017, Ezra Sultan created an account a Coinbase account, using the new account creation form on the Coinbase website. To create his account, Mr. Sultan was required to enter certain personal information, after which he was required to click two boxes. First, he would be required to check a box certifying "I am not a robot." Second, a box indicating "I certify that I am 18 years of age or older, and I agree to the User Agreement and Privacy Policy." "The underlined terms were hyperlinks that, if clicked, took the user to webpages containing the full text of each document." *Sultan v. Coinbase*, 354 F. Supp. 3d at 158. The "User Agreement"—available by clicking that link—contained a mandatory arbitration clause requiring all disputes be settled on an individual basis in accordance with the American Arbitration Association's rules. At the time Mr. Sultan created his account, the account creation webpage contained no other information. Although Mr. Sultan argued that he could not recall the signup process, Coinbase presented evidence that he would have been required to affirmatively check both boxes in order to create an account.

Several months after Mr. Sultan opened his account, he called what he believed to be Coinbase's customer support phone number to inquire about a recent transaction. However, rather than a Coinbase employee, Mr. Sultan was directed to a hacker who elicited personal information from Mr. Sultan and used that personal information to access Mr. Sultan's account and steal over \$200,000 of digital currency. Shortly thereafter, Mr. Sultan filed suit against Coinbase alleging that its lax security policies had caused his losses. Coinbase moved to compel arbitration of the dispute.

The Decision

The court considered two central questions in reaching its decision to grant Coinbase's motion and compel arbitration. First, whether Mr. Sultan was on inquiry notice of the mandatory arbitration clause in Coinbase's User Agreement. Second, whether Mr. Sultan manifested his asset to be bound by those terms.

As in every inquiry notice case, Judge Block began with a review of the website at issue to determine whether, based on the framework set forth in *Nicosia* and *Meyer*, the two recent Second Circuit decisions interpreting user assent to web-based agreements, Coinbase's online interface put Mr. Sultan on notice of the terms to which he was agreeing.

First, the court considered the differences between the Amazon website (at issue in *Nicosia*) and Uber's application (at issue in *Meyer*) that led to the different outcomes in those two cases. (In *Nicosia*, the Second Circuit held that reasonable minds could differ as to whether the Amazon website put users on inquiry notice that, by placing an order through the website, they had agreed to Amazon's "conditions of use." 834 F.3d 220, 229 (2d Cir. 2016). In *Meyer*, the Second Circuit held that Uber users were on inquiry notice that, by creating an account, they had agreed to abide by Uber's "Terms of Service." 868 F.3d 66 (2d Cir. 2017).) On the Amazon website, users who clicked "Place your order" were not specifically asked whether they agreed to the "conditions of use" and the only indication that clicking "Place your order" would subject users to Amazon's "conditions of use" was an inconspicuous notice elsewhere on the webpage that informed users "[b]y placing you order, you agree to Amazon's privacy notice and conditions of use." 834 F.3d at 229, 236. Further, the Second Circuit held that the other information on Amazon's order page, including links in "several different colors, fonts, and locations" and the user's personal billing and shipping information, were distracting and obscured the message that users must manifest their assent to abide by Amazon's "conditions of use" prior to placing an order. *Id.*

By contrast, in *Meyer*, the Second Circuit found that Uber's notice in its smartphone application that "[b]y creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY" was sufficiently prominent to put users on inquiry notice. The court reasoned that the screen "was uncluttered, with only fields for the user to enter his or her credit card details, buttons to register for a user account," and the relevant notice. Additionally, the notice appeared directly below the registration button, could be viewed on the same screen as the registration button, and sufficiently stood out against Uber's white background to make it conspicuous to users. 868 F.3d at 78.

In *Sultan*, the court noted that "Coinbase's interface is far closer to Uber's than Amazon's" because the "account creation screen contains only five fields and two checkboxes." Like the Uber application, the entire screen could be viewed on one page "with a minimalist layout and no distractions." Further, similar to the Uber application, the relevant notice appeared directly above the account creation button. Perhaps most importantly, the court observed that unlike either the Uber or Amazon interface, the Coinbase interface required users to click a box to certify their assent to be bound prior to creating an account. Judge Block held that a reasonably prudent user would review Coinbase's "User Agreement" when prompted to do so on the account creation (and indeed could not create an account without certifying that they had done so).

Having found that Mr. Sultan was on inquiry notice of the terms of the "User Agreement," the court considered whether he had assented to those terms. Mr. Sultan contended that he did not have actual

notice of the terms to which he agreed, but the court held that was “irrelevant” because “it would have been impossible” for Mr. Sultan to create an account without manifesting his agreement to be bound. That indication of assent was sufficient to resolve any reasonable dispute that Mr. Sultan had, as a legal matter, done so.

Avoiding Uncertainty

Perhaps the most interesting component of the *Sultan* decision is that it likely could have been reached without a lengthy comparison between the *Nicosia* and *Meyer* decisions. Those decisions actually involve a somewhat different type of agreement—a so-called “browse-wrap” agreement—where there is no affirmative act (such as a check box) to manifest assent to the contract. In those cases, the only notice to users of their agreement to be bound is a textual notice that appears in the user interface.

By contrast, the *Coinbase* interface was of the form commonly referred to as “click-wrap” agreement. It required users to affirmatively check a box indicating consent to Coinbase’s “User Agreement.” These cases are similar, because the agreement itself can only be accessed by clicking a link, but the addition of the affirmative act of acceptance is a crucial factor in creating an enforceable agreement. In this case, rather than descend into the factual morass—taking into account the color, prominence, and “minimalism” of the notice—the court’s decision suggests that web-based platforms can avoid uncertainty simply by requiring users to certify their assent to be bound, rather than leaving it to courts to determine whether they should be constructively deemed to have done so.

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