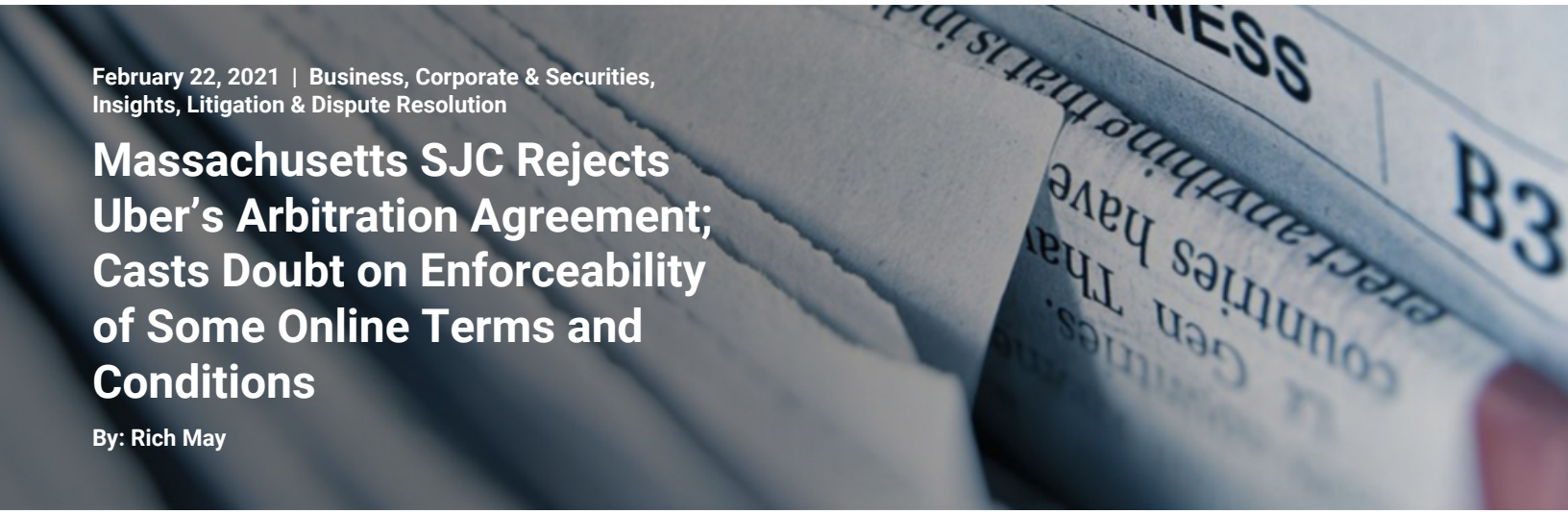


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Massachusetts SJC Rejects Uber's Arbitration Agreement; Casts Doubt on Enforceability of Some Online Terms and Conditions

By: Rich May

On January 4, 2021, the Massachusetts Supreme Judicial Court ("SJC") ruled against Uber Technologies, Inc. ("Uber") when it held that Uber could not compel two users of its app to arbitrate their claims under the provisions of Uber's terms and conditions mandating binding arbitration.



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Background

Plaintiffs Christopher Kauders and Hannah Kauders commenced a lawsuit against Uber arguing, among other things, that the refusal by three of Uber's drivers to provide Christopher Kauders with ride services because he was blind and accompanied by a guide dog was a violation of Massachusetts law. Uber sought to compel arbitration, citing a provision to that effect in its terms and conditions, and the judge granted Uber's motion. Arbitration proceeded in early 2018, and the arbitrator ultimately ruled in Uber's favor.

When Uber sought to confirm the arbitration award, the same judge granted a motion to reconsider and reversed his prior decision on the issue of arbitration, citing the June 25, 2018 decision of the United States Court of Appeal for the First Circuit in *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 62 (1st Cir. 2018) (concluding that Uber's registration process did not create a contract due to lack of reasonable notice of the terms and conditions). Uber then appealed to the Massachusetts Supreme Judicial Court.

SJC Decision

The SJC held that the appropriate legal standard for determining online contract formation is a two-prong test focusing on (i) reasonable notice of the terms and (ii) reasonable manifestation of assent to those terms.

In applying this test to Uber's terms and conditions, the SJC noted that the plaintiff users did not have actual notice of the terms and conditions, because they did not review the terms and Uber's registration process did not require interaction with the terms before agreeing to them, a common feature in many online contracts. Absent this actual notice,

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the SJC held that due to the specific facts surrounding the Uber terms and conditions and registration process (i.e., nature of the transaction being small and short-term, lack of clarity and simplicity of the communication of the terms, and the extensive scope and breadth of the terms and conditions), reasonable notice was also not provided to the plaintiff users.

The SJC also ruled that Uber failed to obtain a reasonable manifestation of assent to its terms and conditions from the plaintiff users, pointing to a discrepancy between the driver registration process and the user registration process, which also weighed on the lack of reasonable notice prong. Drivers, unlike users, were required to review the terms and conditions by clicking a hyperlink and affirmatively assent to such terms by clicking on "YES, I AGREE." The SJC noted that this form of assent, common in "click-wrap" agreements, has frequently been enforced and was readily available and indeed, in use, by Uber at the time.

The SJC also found that the manner in which Uber obtained manifestation of assent was obscured by the interface in the registration process. Unlike in the registration process for drivers, which followed initial acceptance with a screen stating "PLEASE CONFIRM THAT YOU HAVE REVIEWED ALL THE DOCUMENTS AND AGREE TO ALL THE NEW CONTRACTS" and requiring a second acceptance, users like the plaintiffs merely needed to input their payment information and click "DONE." The payment info screen did contain a notice on the bottom stating "By creating an Uber account, you agree to the Terms & Conditions and Privacy Policy", but this notice was placed in such a way that the SJC found it was possible for users to register for an Uber account either without viewing the notice or without understanding the legal ramifications of clicking "DONE."

Because Uber's app's registration process did not provide the plaintiff users with reasonable notice of Uber's terms and conditions, nor did the plaintiff users provide reasonable manifestation of assent to those terms and conditions, the arbitration provisions were unenforceable and the SJC remanded the case for further proceedings.

Impact and Takeaways

Anyone doing business in Massachusetts and relying on online contracts should consider the facts of this case and ensure their online contracts provide reasonable notice of the terms and obtain reasonable manifestation of assent from the counterparty. Ideally, businesses should structure their online contracts to require users to interact with or review the terms and conditions, as well as provide an affirmative manifestation of asset. Rich May's Business, Corporate and Securities practice group is standing by and would be happy to assist if you are concerned about the enforceability of your contracts or have other questions about online contract formation.

Disclaimer: This summary is provided for educational and information purposes only and is not legal advice. Any specific questions about these topics should be directed to attorney Matthew Sweet.