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Conflicting online terms – E.D. Va. rules that "arbitrability delegation" clause requires that arbitrator resolve conflict

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Takeaway: We have written many articles about the use of consumer-facing terms containing mandatory arbitration agreements. "Clickwrap" agreements – agreements that require consumers affirmatively to accept terms – are the preferred enforcement mechanism. Also, "arbitrability delegation" clauses – clauses that unambiguously delegate the threshold jurisdictional question to an arbitrator – constitute another mechanism for a trial court to sidestep difficult jurisdictional questions and transfer an entire dispute to an arbitrator's care. Both of these concepts came into play in a recent class action, *Montoya v. King.com Ltd.*, Civil Action No. 3:23cv314, 2024 WL 1680028 (E.D. Va. Apr. 18, 2024), in which the Eastern District of Virginia ruled that the parties should be required to arbitrate their dispute, including a dispute over how to resolve conflicting contractual terms.

That case arose out of Sorina Montoya's participation, in March and April of 2023, in an online tournament for the popular match-making puzzle game Candy Crush. Ms. Montoya spent over $3,000 and logged nearly 100 hours playing in that tournament. Ultimately, she filed a putative class action against King.com and its corporate affiliates, asserting consumer fraud claims based on Defendants' alleged omission and misrepresentation of "certain information to Tournament participants which caused them to overestimate their chances of success and spend more than they otherwise would have on in-app purchases to boost their competitiveness." *Montoya*, 2024 WL 1680028, at *1.

The defendants moved to compel arbitration, based on Ms. Montoya's entering into a clickwrap agreement in which she agreed to King.com's Terms of Use that contained (1) a compulsory arbitration clause and class action waiver with (2) a provision requiring an arbitrator to decide the threshold question of arbitrability, including any question going to the "applicability" of the arbitration clause. *Id.* at *2–3.

Defendants also had created "a separate set of Tournament Rules to govern Tournament play and activities." *Id*. at *3. The Tournament Rules did *not* contain an arbitration agreement but instead required that any dispute be litigated in a court located in England. (The district court did not explain how Ms. Montoya agreed to the separate Tournament Rules.)

After initially denying that she ever agreed to the Terms of Use, Ms. Montaya eventually conceded that she had agreed to them, contending instead that the Tournament Rules (which did not contain an arbitration clause) superseded the Terms of Use.

But the district court granted the motion to compel arbitration, ruling that an arbitrator should resolve the conflict between the competing terms, given the parties' agreement that an arbitrator and not a court should resolve the applicability of the arbitration agreement set out in the Terms of Use: "Whether

the Tournament Rules or the Terms of Use cover Plaintiff's claims is a dispute over applicability that the arbitrator, not the Court, must decide. . . . Thus, the arbitrator shall decide which terms govern Plaintiff's claims, and if the Terms of Use do apply, whether the claims fall within the scope of the arbitration agreement." *Id*. at *8.