Kilpatrick

JUNE 17, 2019

Ninth Circuit upholds arbitration provision testing the "outer limits" of what constitutes an enforceable arbitration agreement

by James F. Bogan III

Takeaway: Adhesion contracts are ubiquitous in modern internet commerce, and the rules of contract formation are generally the same for paper and on-line contracts. Parties are generally bound by terms and conditions incorporated by reference into paper contracts, so long as the incorporated terms and conditions are reasonably available and viewable. The same principle applies to on-line agreements. The key is ***conspicuousness,*** because a contracting party "is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious." *In re Holl*, -- F.3d --, No. 18-70568, 2019 WL 2293441, at *4 (9th Cir. May 30, 2019) (citation omitted). For these reasons, a so-called "browsewrap" agreement – where terms are posted via hyperlink at the bottom of a website, and where the user is not required to manifest assent to those terms – is generally **un**enforceable (especially in the Ninth Circuit). See *Nguyen v. Barnes & Noble Inc*., 763 F.3d 1171 (9th Cir. 2014). On the other hand, a "clickwrap" (or "click-through") agreement, where the user is required to click an "I agree" box after being presented with the terms, is generally enforceable. In *Holl*, the Ninth Circuit reviewed an on-line arbitration agreement that implicated a combination of the "clickwrap" and incorporation by reference principles, enforcing an arbitration agreement it viewed as on the "outer limits" of conspicuousness. *Id*. at *1. The opinion provides a good primer on the contract formation principles governing on-line agreements.

In that case, Randall Holl filed a putative class action against United Parcel Service (UPS), alleging that UPS regularly charged delivery rates to a certain category of retail customers that were higher than the rates advertised by UPS. UPS moved to compel arbitration, claiming that Mr. Holl enrolled in the UPS My Choice program and that, in so enrolling, he agreed to arbitrate his claim against UPS on an individual basis.

Mr. Holl did not dispute that he enrolled in the UPS My Choice program. Instead, he argued that the arbitration provision was so inconspicuous that no reasonable person would be on notice of its existence. With no such notice, Mr. Holl said, he could not have assented to the provision (and therefore the provision could not be a part of the parties' contract).

Here is what happened: In signing up for the UPS My Choice program, Mr. Holl checked a box next to language stating: "By selecting this checkbox and the Continue button, I agree to the UPS Technology Agreement and the UPS My Choice® Service Terms." *Holl*, 2019 WL 2293441, at *1.

Within this language, the "UPS Technology Agreement" and the "UPS My Choice® Service Terms" references were hyperlinks that, when clicked, directed the user to the current versions of those agreements.

The UPS My Choice® Service Terms was a three-page agreement that said nothing about arbitration. But Paragraph (1) of those terms, entitled "Governing Terms," stated that the "UPS Tariff/Terms and Conditions of Service" governed Mr. Holl's use of the UPS May Choice services, and further that the "UPS Tariff/Terms and Conditions of Service" were published on ups.com and were "expressly incorporated here by this reference."

To access the "UPS Tariff/Terms and Conditions of Service" on ups.com, the user had to find the "Service Terms and Conditions" link appearing at the bottom of the website, which contained an index of various terms, the first one being the "UPS Tariff/Terms and Conditions of Service." Clicking that link directed the user to a 32 pages of terms of conditions, which included the arbitration provision in Section 52.

Over Holl's objection, the district court granted UPS's motion to compel arbitration. Holl then filed a petition for writ of mandamus asking the Ninth Circuit to vacate the district court's order compelling arbitration.

According to the panel, the case "test[ed] the outer limits of what constitutes a 'reasonably conspicuous' provision as part of the terms of usage so prevalent in the adhesion contracts of modern internet commerce." *Id*. at *1.

The beginning of the analysis was easy, given that Mr. Holl checked the box: "Here, there is no question Holl affirmatively assented to the UPS My Choice Service Terms. He checked a box acknowledging as much." *Id*. at *5. But the UPS My Choice Service Terms said nothing about arbitration. So the issue depended on whether those terms validly incorporated the document containing the arbitration clause – the UPS Tariff/Terms and Conditions of Service.

Applying California law, the panel observed that "[t]he rules of consumer online agreements and consumer paper agreements are the same." *Id*. at *5. The panel further observed: "In the context of paper transactions, California courts have deemed analogous incorporations by reference valid and the incorporated terms binding." *Id*. at *5. But the panel further noted (as the district court itself recognized), "locating the arbitration clause at issue here requires several steps and a fair amount of web-browsing intuition." *Id*. at *4.

At the end of the day, Holl's affirmative assent to the UPS My Choice Service Terms, combined with those terms' unambiguous incorporation by reference of the UPS Tariff/Terms and Conditions of Service (which contained the arbitration agreement), created an enforceable arbitration agreement between Holl and UPS.

But this was not an ordinary appeal. The panel evaluated a petition for writ of mandamus, which is governed by a very deferential standard of review. Emphasizing that Mr. Holl sought the "extraordinary remedy" of mandamus, the panel could not say, viewing the largely undisputed facts and governing California contract law, that the district court's order was "clearly erroneous as a matter of law." *Id*. at *4.

As the panel noted, this issue should not arise for UPS in the future: "The My Choice Service Terms ***now*** include a hyperlink to the UPS Tariff/Terms and Conditions of Service and expressly inform the user that the incorporated document contains an agreement to arbitrate." *Id*. at *4 (emphasis added).