

Retail Industry 2021 Year in Review: What You Need to Know About the Enforceability of e-Commerce Terms of Use

Article By:

Cecilia Y. Oh

Jessica G. Yeshman

Faheem Fazili

RETAIL INDUSTRY 2021 YEAR IN REVIEW

The use of retail websites and mobile applications to make online purchases continued to experience rapid growth in 2021, fueled by the COVID-19 variants and rapid advances in technology. Those consumers who were accustomed to shopping in brick-and-mortar establishments before the pandemic, discovered the convenience and unlimited array of choices made possible through e-commerce. Even as pandemic restrictions began to ease, many consumers continued to shop from the comfort of their own living rooms, having overcome the initial friction associated with first-time purchases through a particular e-commerce site. Revenue from retail e-commerce in the United States alone was estimated at roughly \$768 billion in 2021 and is forecasted to exceed \$1.3 trillion by 2025.¹

The growth of e-commerce comes with a myriad of risks for retailers, What You Need to Know About the Enforceability of e-Commerce Terms of Use including class action lawsuits arising from data breaches, copyright infringement claims and fraudulent purchases. Some of these risks, and retailers' associated liability and exposure created by such risks, can be mitigated by putting into place binding and enforceable contracts with users of e-commerce websites and mobile applications in the form of online "terms of use." This article examines two significant areas of exposure for online retailers related to the enforceability of online terms of use.

Terms of Use must be affirmatively accepted by users.

In the United States, the creation of enforceable online terms of use (Terms of Use) requires, among other things, the affirmative manifestation of assent from the user. Terms of Use presented in the form of a "clickwrap" agreement have replaced earlier forms of electronic contracting. The defining feature of clickwrap agreements is that users affirmatively manifest their acceptance of the Terms of Use by clicking "I agree" or checking a box next to an attestation acknowledging acceptance of the Terms of Use. Currently, clickwrap agreements represent the most prevalent form of "wrap"

agreement, and have become the gold standard for agreeing to Terms of Use in connection with e-commerce transactions.

More recently, however, some retailers have shifted to a relatively new form of electronic contracting, referred to as the “sign-in wrap” agreement. The key characteristic of the sign-in wrap is the use of a dualpurpose button (e.g., a button to “Complete Purchase” or “Sign-In”) to both accept the Terms of Use and perform a separate function, such as signing into the user’s account or completing a purchase. This shift represents retailers’ strong desire to reduce friction in the customer experience by requiring fewer clicks to complete a particular transaction. Generally, sign-in wrap agreements will be enforced only if: (1) a reasonably prudent user would be on notice of the existence and contents of the Terms of Use, and (2) the user proceeds to click on the dual-purpose button with the intention of being bound to such Terms of Use. Whether a sign-in process satisfies the first prong requires a fact-specific analysis of the particular details of the process (e.g., placement of the attestation, font size and color, proximity of the Terms of Use, etc.). When presenting Terms of Use in the form of a sign-in wrap agreement, retailers should be aware that less friction in the acceptance process generally results in more risk that the sign-in wrap will not be enforceable against the user.

To mitigate enforceability risks associated with the sign-in wrap style of acceptance, retailers should consider each of the following questions in the context of their acceptance process:

- Is the attestation of acceptance clear and conspicuous, relative to the rest of the page?
- Is the attestation positioned in close proximity to the dual-purpose button?
- Does the attestation include a hyperlink to the Terms of Use?
- Is the hyperlink visually distinct from the rest of the attestation?
- Are users required to re-accept the Terms of Use upon each amendment?

Of course, a strong sign-in process is meaningless unless it is part of an appropriate, risk-based electronic signature process that includes systems and procedures to manage version control, user authentication and record retention. When designing and implementing any Terms of Use acceptance process for e-commerce sites, retailers should facilitate close coordination between the application development teams and legal counsel to ensure that a positive user experience is harmonized with the relevant contract formation requirements.

Not all binding arbitration and class action waiver provisions are, in fact, binding.

The benefits of including binding arbitration and class action waiver provisions in Terms of Use are compelling to many online retailers. Individual arbitration sessions are generally less costly than litigation and are concluded more quickly and efficiently than litigation. Moreover, arbitration proceedings are confidential, such that retailers may avoid the negative publicity and potential reputational harm that may be associated with litigation, the threat of which may induce retailers to quickly settle even frivolous claims spearheaded by plaintiffs’ firms. However, several factors may impact whether courts will enforce binding arbitration and class action waiver provisions in Terms of Use. This section discusses best practices designed to ensure that binding arbitration and class action waiver provisions are enforceable against consumers in disputes with retailers, which are

governed by Terms of Use.

The Federal Arbitration Act (FAA) was enacted by Congress on February 12, 1925. The FAA gives a party to an arbitration agreement the right to ask the court to compel arbitration as long as the claim falls within the scope of arbitration. The FAA preempts inconsistent state laws and applies regardless of whether the lawsuit is filed in a state or federal court, as long as the claim involves interstate commerce.² In a series of watershed decisions, the US Supreme Court confirmed the validity and enforceability of binding arbitration and class action waiver provisions in Terms of Use. These decisions, along with several lower courts' decisions that followed, highlight certain features of binding arbitration and class action waiver provisions, the presence of which are more likely to result in enforceability of these provisions in a retailer's Terms of Use.

These best practices include the following:

- Include class action waiver within the arbitration agreement rather than as a standalone provision in the Terms of Use to ensure FAA preemption applies.
- Include clear and conspicuous language that puts the consumer on notice that the Terms of Use include a binding arbitration and class action waiver provision.
- Location of arbitration proceedings should be held in a convenient location for the consumer.
- Consider language that helps the consumer offset the financial burden of arbitration by offering to pay for the costs of arbitration and/or their reasonable attorneys' fees.
- Consider providing for a limited opt-out right if exercised within a reasonable period following acceptance of the arbitration agreement.

These specific issues are part of the overall contracting considerations with respect to Terms of Use. When creating or reviewing Terms of Use, online retailers should give close consideration to how Terms of Use and binding arbitration and class action waiver provisions are presented to consumers to ensure that each will be enforceable against the consumer in the event of a dispute. Finally, once Terms of Use are posted, online retailers should continue to periodically update their Terms of Use to conform to changes in law.

FOOTNOTES

1 <https://www.statista.com/outlook/digital-markets>

2 AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011)