

Client Alert

October 2017

Ninth Circuit Upholds Enforceability of Arbitration Agreements in Click-Through Agreements

In a decision with significant implications for online retailers, on September 19, 2017, the Ninth Circuit Court of Appeals found that a consumer who purchased a product from Amazon was bound by hyperlinked terms of service containing an arbitration provision. In *Wisely v. Amazon.com Inc.*, the three-judge panel affirmed a district court's order dismissing an Amazon user's putative class action alleging violations of California consumer protection laws, and granting Amazon's motion to compel arbitration.¹ The Ninth Circuit's decision provides justification for the enforceability of arbitration provisions contained in an adhesive contract, which is a "standardized contract which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it."²

Case Background

Plaintiffs Andrea Fagerstrom and Allen Wiseley brought a putative class action in California state court against Amazon asserting claims under California's Unfair Competition Law (UCL) and False Advertising Law (FAL).³ After removing the case to the US District Court for the Southern District of California, Amazon moved to dismiss the action and compel arbitration.⁴

The motion was based on the terms and conditions to which consumers agree when they make purchases through Amazon's website. Customers must go through a checkout page, which contains a "notice to customers stating that 'By placing your order, you agree to Amazon.com's privacy notice and conditions of use.'"⁵ The conditions of use (COU) include an arbitration provision that states:

Any dispute or claim relating in any way to your use of any Amazon Service, or to any products or services sold or distributed by Amazon or through Amazon.com will be resolved by binding arbitration, rather than in court, except that you may assert claims in small claims court if your claims qualify.... The arbitration will be conducted by the American Arbitration Association (AAA) under its rules, including the AAA's Supplementary Procedures for Consumer-Related Disputes.⁶

¹ *Wisely v. Amazon.com Inc.*, No. 15-56799, 2017 WL 4150341 (9th Cir. Sept. 19, 2017).

² *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1260-61 (9th Cir. 2017) (citing *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 113 (2000) (quoting *Neal v. State Farm Ins. Cos.*, 188 Cal.App.2d 690, 694 (1961))).

³ *Andrea Fagerstrom and Allen Wiseley, et al. v. Amazon.com, Inc.*, Notice of Removal, No. 15-cv-0096-BAS-DHB, (S.D. Cal. Jan. 1, 2015) (ECF 1, Attachment 3).

⁴ *Fagerstrom and Wiseley v. Amazon.com*, Order granting Motion to Compel Arbitration and Dismiss Plaintiffs Claims, at 1 (S.D. Cal. Oct. 20, 2015) (ECF 25).

⁵ See *id.* at 3.

⁶ See *id.* at 4 (emphasis in original).

On October 20, 2015, the district court granted Amazon's motion to compel arbitration and dismissed the action without prejudice.⁷ In doing so, the district court determined that the COU created a valid contract between Amazon and its customers, including Wiseley.⁸

Wiseley appealed the district court's ruling, arguing that the district court erred in compelling arbitration because the arbitration provision of the COU is unconscionable.⁹

Ninth Circuit Opinion

The Ninth Circuit affirmed, finding the COU is a binding contract and neither procedurally nor substantively unconscionable.

First, the court recognized that COUs "are adhesive in nature," but held that adhesion alone is not sufficient "to support a procedural finding of procedural unconscionability," where there are no other "indicia of procedural unconscionability present."¹⁰ The court further found that Wiseley's "clicking the corresponding action button" on Amazon's checkout and account registration pages "constituted agreement to the hyperlinked COU." Wiseley had a "'reasonable opportunity to understand' that he would be bound by the additional terms."¹¹

Similarly, the court found that the incorporation by reference of the American Arbitration Association's (AAA) rules was not procedurally unconscionable because Wiseley "had a 'reasonable opportunity to understand' ... that the Consumer Arbitration Rules would apply in the context of his consumer purchases, and he could call the provided phone number to resolve any lingering uncertainty."¹² The court further stated that if an arbitration clause is presented in the same font as the rest of the COU and has key terms bolded, there is no procedural unconscionability.¹³

Second, the court found that "Wiseley's three arguments for substantive unconscionability" lacked merit.¹⁴ The court determined that "a unilateral modification clause does not render the arbitration provision substantively unconscionable because Amazon is limited by the implied covenant of good faith and fair dealing."¹⁵ Further, "the arbitration clause's exemption of intellectual property claims for injunctive relief does not make the provision overly harsh or one-sided."¹⁶ Lastly, the court determined that the attorneys' fee provision was not substantively unconscionable because it was reciprocal under Washington law, and it also complies with California law.¹⁷ Consequently, the court affirmed the district court's ruling.¹⁸

⁷ See *id.*

⁸ See *supra* n. 1, at *2.

⁹ See *Wiseley v. Amazon.com Inc.*, No. 15-56799, 2016 WL 845580 (C.A.9 Feb. 29, 2016).

¹⁰ See *id.* (citing *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wash. 2d 293, 304 (2004)). Both the Ninth Circuit and the district court analyzed the plaintiff's claims under Washington rather than California law, based on a choice of law provision in the COU. Notably, though, the Ninth Circuit stated that the outcome would have been the same under California or Washington law.

¹¹ See *id.* (citing *Zuver*, 153 Wash. 2d at 304 (quoting *Schroeder v. Fageol Motors, Inc.*, 86 Wash. 2d 256, 260 (1975))).

¹² See *id.* at *2 (citing *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1262 (9th Cir. 2017); *Baltazar*, 62 Cal. 4th 1237, 1246 (2016); cf. *Woodward v. Emeritus Corp.*, 192 Wash. App. 584, 593, 595, 607 (2016) (holding that a similar provision referencing the AAA rules "effectively incorporates the Rules by reference")).

¹³ See *id.*

¹⁴ See *id.*

¹⁵ *Id.* (citing *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1033 (9th Cir. 2016) (applying California law); cf. *Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wash. 2d 102, 112–13 (2014) (holding that the duty of good faith limits a party's unilateral discretion to determine a contract term)).

¹⁶ *Id.* (citing *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wash. 2d 781, 815–16 (2009)).

¹⁷ See *id.* (citing Wash. Rev. Code §§ 4.84.185 and 4.84.330; *McKee v. AT & T Corp.*, 164 Wash. 2d 372, 400 (2008)).

¹⁸ Wiseley filed a Petition for Rehearing *En Banc* on October 3, 2017, and the matter is currently pending. See *id.*, No. 15-56799 (Oct. 3, 2017) (ECF 44).

Implications

The Ninth Circuit's opinion bolsters the enforceability of arbitration provisions contained in adhesive contracts.¹⁹ However, companies that have electronic agreements that are "adhesive" should be mindful that the arbitration clauses should be presented in the same font as the rest of their conditions of use, and have key terms bolded such that a party can have reasonable notice of the additional terms. This is consistent with prior decisions involving "click-through" agreements for consumer products. For example, the Tenth Circuit in *Hancock v. AT&T Co.* held that arbitration provisions and other contractual terms in electronic transactions are enforceable even if a consumer is provided a hyperlink or other way to access the terms of the contract and requires the consumer to affirmatively accept those terms (including the arbitration provision contained therein) by checking off a box or clicking a button that expresses assent to the terms.²⁰ In *Hancock*, the court stated that clickwrap agreements that provide "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers" are routinely upheld. Further, the US District Court for the District of New Jersey granted Dell's motion to compel arbitration in *Khan v. Dell Inc.*, after it found that customers who purchased Dell's 600M computers were required to review and agree to the product purchase agreement, which contained an arbitration provision and a class-action waiver, during their online checkout process.²¹ The *Khan* Court in part based its holding on that, under *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), and Texas and New Jersey state law, the fact that the contract was one of adhesion was insufficient to prevent enforcement of the contract's arbitration clause.²²

Hunton & Williams LLP has extensive experience drafting arbitration agreements and litigating disputes that arise from them. The firm is well positioned to advise clients on arbitration agreements and to represent them in both domestic and international arbitration proceedings.

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¹⁹ Notably, the court denied Amazon's request for publication. The court noted that "this disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3." Therefore, when relying on this Order, be mindful of your jurisdiction regarding citing to unpublished opinions since it may not be permissible in your jurisdiction.

²⁰ *Hancock v. AT&T Co.*, 701 F.3d 1248 (10th Cir. 2012).

²¹ *Khan v. Dell Inc.*, 2014 WL 718314 (D.N.J. Feb. 1, 2014).

²² *See id.*