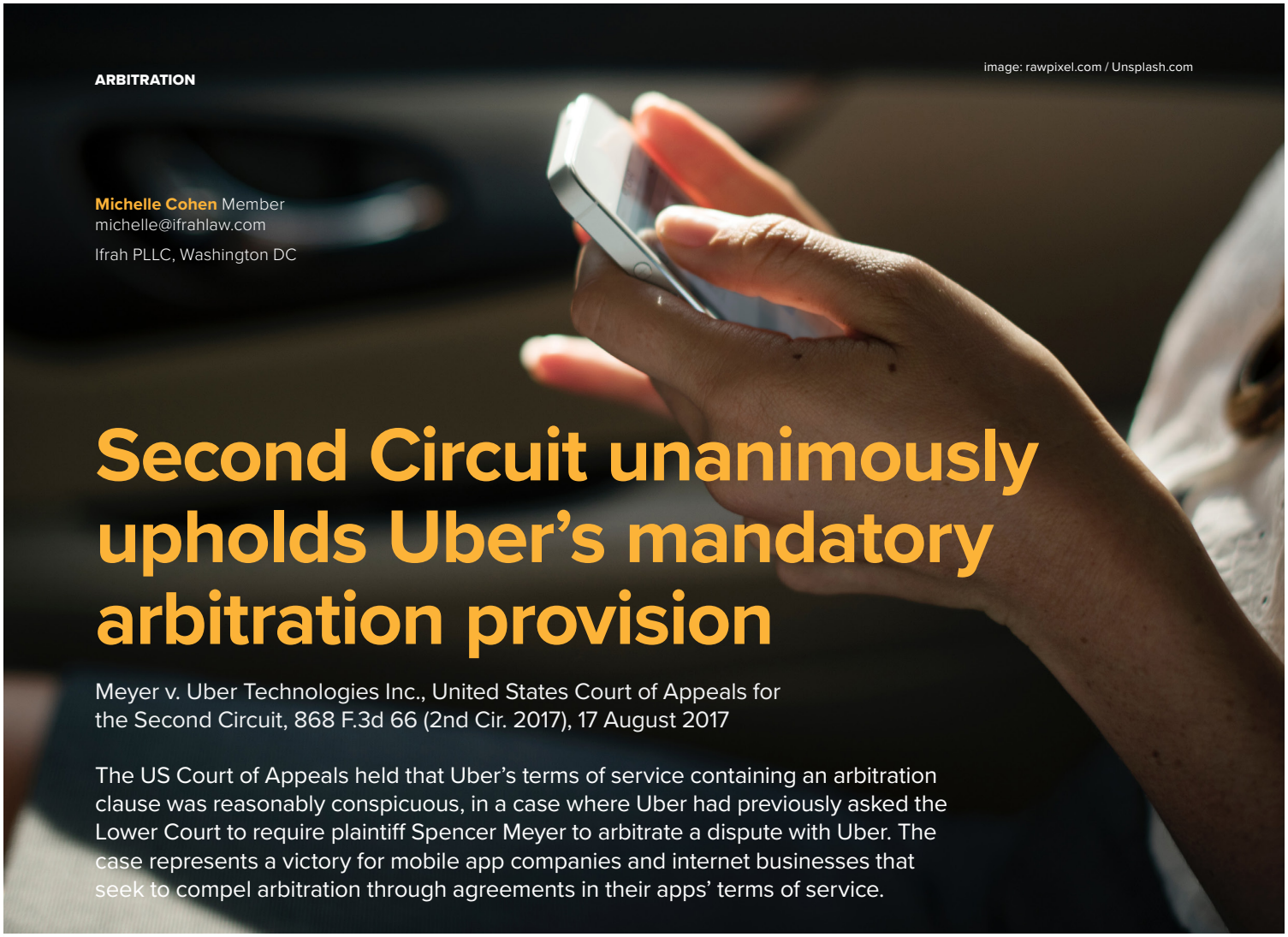

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Second Circuit unanimously upholds Uber's mandatory arbitration provision

Meyer v. Uber Technologies Inc., United States Court of Appeals for the Second Circuit, 868 F.3d 66 (2nd Cir. 2017), 17 August 2017

The US Court of Appeals held that Uber's terms of service containing an arbitration clause was reasonably conspicuous, in a case where Uber had previously asked the Lower Court to require plaintiff Spencer Meyer to arbitrate a dispute with Uber. The case represents a victory for mobile app companies and internet businesses that seek to compel arbitration through agreements in their apps' terms of service.

In August 2017, the United States Court of Appeals for the Second Circuit unanimously ruled for Uber Technologies, Inc. ('Uber'), the ride-hailing service, holding that Uber's terms of service containing an arbitration clause was reasonably conspicuous and plaintiff Spencer Meyer assented to it by registering for an Uber account[1]. While the Appeals Court remanded the case to the Federal District Court for the resolution of related issues, the case represents a victory for mobile app companies and internet businesses that seek to compel arbitration through agreements in their apps' terms of service. Many companies view arbitration as preferable to state or federal court litigation for several reasons, including the ability to exclude class actions, confidentiality (and lack of published decisions that set precedent), reduced litigation costs, and an experienced neutral decision-maker.

Spencer Meyer sued Uber in court; Uber seeks to arbitrate per its 'browse-wrap' terms

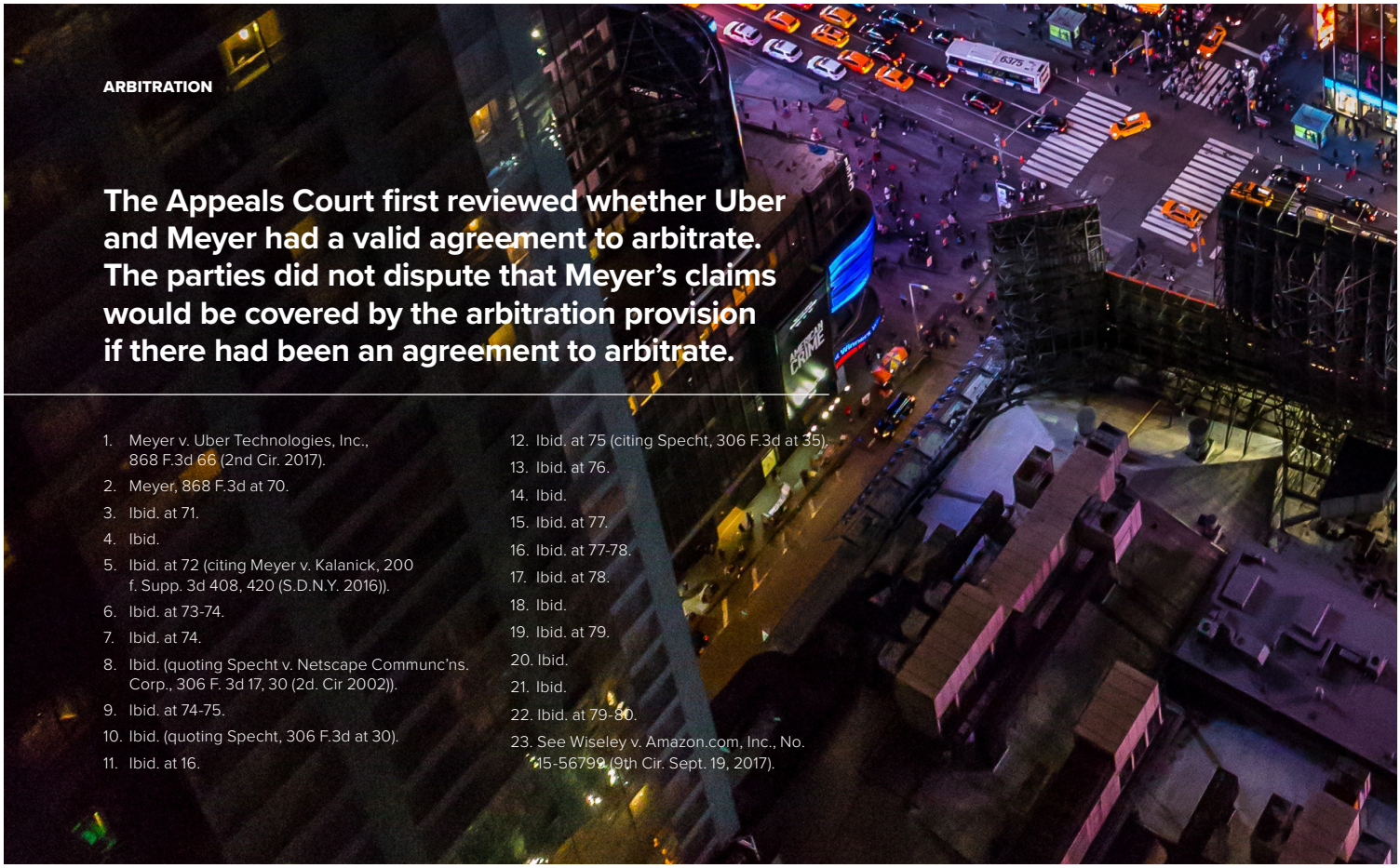
Spencer Meyer, a Connecticut resident and Uber user, sued Uber and its then CEO, Travis Kalanick, in federal District Court in New York, for illegal price fixing under Section 1 of the federal Sherman Act and a similar New York law, particularly relating to Uber's 'surge' pricing. Meyer's case was filed as a putative class action in which he sought to sue on behalf of a nationwide class who had used the Uber app to obtain a ride and paid a fare based on the Uber pricing algorithm.

In response, Uber asked the District Court to require Meyer to arbitrate his dispute with Uber. Uber based its arbitration argument on the mandatory arbitration provision set forth in Uber's terms of service, which Uber presented in the app when Meyer registered for his Uber account using the app. Meyer asserted that the terms of service were not reasonably conspicuous and that he did not agree to the arbitration provision. The Federal District Court denied Uber's motions. Absent a further ruling, Meyer could continue his potential class action in federal court. Uber appealed to the Federal Circuit Court, which ruled for Uber. The Court found that the terms of service were conspicuous. The Court also concluded that Meyer had, in essence, assented because a reasonable user would understand that he was agreeing to additional terms (and Meyer had an opportunity to click and read all those terms, including the arbitration clause).

Uber's terms of use and arbitration provision

Uber submitted evidence documenting when Meyer registered for an Uber account and the screens and language that were presented to him. Following Meyer's entering of basic registration information and clicking 'Register,' Meyer was presented with a statement advising him that 'by creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY[2].' This capitalised phrase (appearing in blue text and underlined) contained a hyperlink that, if clicked by a user, would present Uber's Terms of Service and Privacy Policy. Meyer did not recall seeing or clicking on the hyperlink. He further declared that he did not read Uber's Terms and Conditions, including the arbitration provision[3].

Uber, like many companies, places an arbitration clause in its terms of service. The arbitration provision applicable at the



The Appeals Court first reviewed whether Uber and Meyer had a valid agreement to arbitrate. The parties did not dispute that Meyer's claims would be covered by the arbitration provision if there had been an agreement to arbitrate.

1. Meyer v. Uber Technologies, Inc., 868 F.3d 66 (2nd Cir. 2017).
2. Meyer, 868 F.3d at 70.
3. Ibid. at 71.
4. Ibid.
5. Ibid. at 72 (citing Meyer v. Kalanick, 200 f. Supp. 3d 408, 420 (S.D.N.Y. 2016)).
6. Ibid. at 73-74.
7. Ibid. at 74.
8. Ibid. (quoting Specht v. Netscape Communc'ns. Corp., 306 F. 3d 17, 30 (2d. Cir 2002)).
9. Ibid. at 74-75.
10. Ibid. (quoting Specht, 306 F.3d at 30).
11. Ibid. at 16.
12. Ibid. at 75 (citing Specht, 306 F.3d at 35).
13. Ibid. at 76.
14. Ibid.
15. Ibid. at 77.
16. Ibid. at 77-78.
17. Ibid. at 78.
18. Ibid.
19. Ibid. at 79.
20. Ibid.
21. Ibid.
22. Ibid. at 79-80.
23. See Wiseley v. Amazon.com, Inc., No. 15-56799 (9th Cir. Sept. 19, 2017).

time of Meyer's registration consisted of a large paragraph, titled (in bold) 'Dispute Resolution.' The provision (with certain exceptions) required the user and Uber to resolve disputes through binding arbitration. The clause further instructed, in bold, that each party waived a trial by jury and to participate in a class action[4]. In federal District Court, Uber moved to compel Meyer to arbitrate the price fixing dispute. Uber invoked the arbitration provision. The Lower Court denied the motion, finding that Meyer "did not have reasonably conspicuous notice of the Terms of Service and did not unambiguously manifest assent to the terms[5]." Therefore, according to the District Court, Meyer could not have agreed to arbitrate.

The Second Circuit reviews whether Uber's terms of service/arbitration clause contain a valid agreement

The Appeals Court first reviewed whether Uber and Meyer had a valid agreement to arbitrate. The parties did not dispute that Meyer's claims would be covered by the arbitration provision if there had been an agreement to arbitrate. The Court noted that under the Federal Arbitration Act, Congress favours written arbitration agreements.

The U.S. Supreme Court and other courts have consistently enforced arbitration provisions[6]. However, a court must find that the parties agreed to arbitrate before a court will enforce an arbitration provision. To determine if a valid agreement exists, the court reviews applicable state contract law.

In this case, the Court applied California law (instead of New York law), though it noted that New York law on the subject is similar[7]. Under California law, 'an offeree [...] is not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious[8].' However, even if it is not established that the offeree had actual notice of the terms of the agreement, he or she (or it, in the case of an organisation), may be found to be on notice if 'a reasonably prudent user would be on inquiry notice of the terms[9].' The crux of the 'inquiry notice' is the 'clarity and conspicuousness of arbitration terms[10].' When a web based contract term is involved, the court looks at the 'design and content' of the interface[11]. The Appeals Court observed that it would be required to find that Meyer had "reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms" to conclude that a contract had been formed by Meyer with Uber[12].

Here, Uber did not require Meyer to affirmatively agree to the contract terms. Rather, at the registration button, there was a notice that the user was agreeing to the 'TERMS OF SERVICE AND PRIVACY POLICY' (with hyperlinks)[13]. The Appeals Court noted that courts in other jurisdictions have found similar agreements valid when the existence of the terms "was reasonably communicated to the user[14]."

Was Meyer a "reasonably prudent smartphone user"?

In determining whether the arbitration provision was reasonably conspicuous, the Appeals Court stated it would consider the perspective of "a reasonably prudent smartphone user[15]." The Court further concluded that most Americans have used apps and entered into contracts via smartphone. The Court reasoned that a "reasonably prudent smartphone user knows that text that is highlighted in blue and underlined is hyperlinked to another webpage where additional information will be found[16]."

The Court examined Uber's screen design and language. It concluded that the screen was uncluttered and the reference (in caps) to Uber's Terms of Service and Privacy Policy (including the hyperlinks) appeared right below the registration buttons. Further, a user could see the entire screen "at once," without scrolling down or clicking further[17]. The Court also noted favourably that the notice of the Terms of Service was directly related and adjacent to the registration feature. The Court

image: John Baker / Unsplash.com

concluded that "a reasonably prudent smartphone user would understand that the terms were connected to the creation of a user account[18]."

Importantly, the Court found that Uber's placing of Terms and Conditions (containing the arbitration clause) only as a hyperlink did not bar a finding of reasonable notice to Meyer. Rather, Uber prompted its users to read the Terms and Conditions through the wording that '[b] y creating an Uber account, you agree[19],' and that consumers would understand that they were subjecting themselves to additional terms. The Court ultimately concluded that the hyperlinked text was reasonably conspicuous and that a "reasonably prudent smartphone user would have constructive notice of its terms" (even if many users would never read the terms)[20]. A user nevertheless would be on inquiry notice.

The Court also disagreed with the Lower Court that the arbitration clause's location within the Terms and Conditions was insufficient. Rather, according to the Appeals Court, the arbitration clause was clear, with the heading 'Dispute Resolution,' and bolded terms concerning the waiver of a jury trial and class claims[21].

Did Meyer assent to the contractual terms (including the arbitration provision)?

The Appeals Court ruled that Meyer assented. The Court found that a "reasonable user would know that by clicking the registration button, he was agreeing to the terms and conditions accessible via the hyperlink, whether he clicked on the hyperlink or not[22]." Importantly, the Court noted that Meyer had the opportunity to review the Terms of Service prior to registering.

Further proceedings

While the Court found the arbitration provision enforceable, it remanded the case to the District Court on Meyer's argument that Uber waived its right to arbitrate by actively participating in this litigation.

Impact of this ruling

The Second Circuit sent a clear message that, in the smartphone age, terms and conditions available via hyperlinks (including arbitration clauses) will bind a user and be enforced by a court, provided certain conditions are met. Each case, however, will be a fact-specific review. Companies designing terms for apps and websites should carefully review how the terms are presented (including at what point in the process). The Second Circuit noted favourably that Uber's reference to its Terms and Conditions were presented in an uncluttered fashion at the point of registration. And, the hyperlinks were noticeable through the use of colour and were underlined. Further, a user saw the reference to the terms when registering, not after. The user could see the entire screen at once.

This decision may signal a trend among courts to uphold arbitration provisions in terms of use. A month later, the Ninth Circuit upheld Amazon's arbitration provision (part of its Conditions of Use), finding that an individual could not bring a purported class action asserting deceptive pricing claims against Amazon and was compelled to arbitrate[23]. In this case, Amazon presented the user with a hyperlink to its Conditions of Use on two occasions - at registration and at order confirmation. Applying Washington law, the Court found that Amazon's presentation of its hyperlinked terms was in sufficient proximity to the action buttons such that the user would have a "reasonable opportunity to understand" that by registering (and later placing an order), he/she would be bound by additional terms.

Many organisations favour arbitration clauses in consumer contracts, particularly to curb prevalent class action, to limit litigation expenses, and to keep matters confidential. Uber's victory in the Second Circuit serves as a guide for other companies, which should consider the "reasonably prudent smartphone user" when designing app Terms and Conditions and seeking to bind users.