

Arbitration – Uber – App

Supreme Judicial Court

By: Mass. Lawyers Weekly Staff ◉ January 5, 2021

Where a lawsuit was filed claiming that three Uber drivers, in violation of G.L.c. 272, §98A, refused to provide a plaintiff with rides because he was blind and accompanied by a guide dog, the dispute is not arbitrable, as there was no enforceable contract between the parties requiring arbitration.

“Plaintiffs Christopher Kauders and Hannah Kauders commenced a lawsuit against defendants Uber Technologies, Inc., and Rasier, LLC (collectively, Uber), in the Superior Court, claiming, among other things, that three Uber drivers, in violation of G.L.c. 272, §98A, refused to provide Christopher Kauders with rides because he was blind and accompanied by a guide dog. Each of the plaintiffs registered with Uber through its cellular telephone application (app). Citing a provision in its terms and conditions, Uber sought to compel arbitration. The plaintiffs opposed arbitration on various grounds, including that there was no enforceable arbitration agreement. The judge granted Uber’s motion, and the parties arbitrated their dispute in early 2018. On June 4, 2018, the arbitrator issued findings and a decision, ruling in favor of Uber on all of the plaintiffs’ claims.

“On June 25, 2018, the United States Court of Appeals for the First Circuit issued a decision in *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 62 (1st Cir. 2018) (*Cullinane II*), concluding that Uber’s registration process did not create a contract because it did not provide reasonable notice to users of the terms and conditions. Several months later, after Uber moved to confirm the arbitration award, the judge who had granted the motion to compel arbitration allowed a motion for reconsideration and reversed his earlier decision, concluding that there was no enforceable contract requiring arbitration. In this appeal, Uber contends that the judge had no choice but to confirm the arbitration award once the plaintiffs failed to challenge the award within thirty days.

“We conclude that the issue of arbitrability was preserved for appeal. We also conclude that Uber’s terms and conditions did not constitute a contract with the plaintiffs. The app’s registration process did not provide users with reasonable notice of the terms and conditions and did not obtain a clear manifestation of assent to the terms, both of which could have been easily achieved. Indeed, a review of the case law reveals that Uber has no trouble providing such reasonable notice and requiring express affirmation from its own drivers. Here, in remarkable contrast, both the notice and the assent are obscured in the registration process. As a result, Uber cannot enforce the terms and conditions against the plaintiffs, including the arbitration agreement at issue here. ...

“We have not previously considered what standard a court should use when considering issues of contract formation for online contracts. That being said, the fundamentals of online contract formation should not be different from ordinary contract formation. ... The touchscreens of Internet contract law must reflect the touchstones of regular contract law.

"In evaluating whether provisions in an online agreement were enforceable, the Appeals Court in *Ajemian v. Yahoo!, Inc.*, 83 Mass. App. Ct. 565, 574 (2013)] used a reasonableness standard, focusing on whether the contract provisions at issue 'were reasonably communicated and accepted.' ... Under this standard, for there to be an enforceable contract, there must be both reasonable notice of the terms and a reasonable manifestation of assent to those terms. ...

"We conclude that this two-prong test, focusing on whether there is reasonable notice of the terms and a reasonable manifestation of assent to those terms, is the proper framework for analyzing issues of online contract formation. ...

"... At the bottom of one screen in Uber's registration process, the following language appeared: 'By creating an Uber account, you agree to the Terms & Conditions and Privacy Policy.' This text was divided into two parts, with the first part — describing the consequences of creating an account — being less prominently displayed than the link to the terms and conditions and the privacy policy. The app also contained a button that led to a link to the terms and conditions. The question then becomes whether this type of notice was reasonable, particularly given the nature of the online transaction and the scope of the terms and conditions.

"The notice of the terms was not reasonable for several reasons. Importantly, the interface did not require the user to scroll through the conditions or even select them. The user could fully register for the service and click 'done' without ever clicking the link to the terms and conditions. ...

"In sum, we do not consider the notice provided by this interface reasonable. In such a transaction, a user may reasonably believe he or she is simply signing up for a service without understanding that he or she is entering into a significant contractual relationship governed by wide-ranging terms of use. Instead of requiring its users to review those terms and conditions as it appears to do with its drivers, Uber has designed an interface that allows the registration to be completed without reviewing or even acknowledging the terms and conditions. In these circumstances, Uber has failed to show that it provided the plaintiffs with reasonable notice of the terms and conditions. ...

"For the foregoing reasons, we conclude that there was no enforceable agreement between Uber and the plaintiffs, and therefore the dispute was not arbitrable. The case is remanded for further proceedings consistent with this opinion."

Kauders, et al. v. Uber Technologies, Inc., et al. (Lawyers Weekly No. 10-001-21) (43 pages) (Kafker, J.) A motion to compel arbitration was heard by Douglas H. Wilkins, J.; a motion for reconsideration was heard by him; and a motion to confirm the arbitration award was also heard by him. Felicia H. Ellsworth for the defendants; W. Paul Needham for the plaintiffs; the following submitted briefs for amici curiae: Bruce H. Stern, of New Jersey, Jeffrey R. White, of the District of Columbia, Kathy Jo Cook, Thomas R. Murphy, Kevin J. Powers, Kristie A. LaSalle, Lauren G. Barnes and Michael J. McCann for Massachusetts Academy of Trial Attorneys and another; Ben Robbins and Martin J. Newhouse for New England Legal Foundation; Archib A. Parasharami, of the District of Columbia, and Steven P. Lehotsky for the Chamber of Commerce of the United States of America; Karla Gilbride, of the District of Columbia, Rhea Ghosh, of New York, and Stuart Rossman for Public Justice, P.C., and another (Docket No. SJC-12883) (Jan. 4, 2021).

[Click here to read the full text of the opinion.](#)

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