Hon. Tricia Bigelow (Ret.)
SIGNATURE RESOLUTION

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When is an arbitration agreement enforceable?

A LOOK AT THE STATUTES AND CASELAW, WITH SPECIAL EMPHASIS ON TODAY'S ONLINE AGREEMENTS

In today's world, arbitration agreements are inescapable. They show up in employment and consumer agreements. They're printed on the backs of purchase orders and receipts. They're included in employee handbooks, product brochures and packaging, and – most significantly – are embedded in the fine print of online transactions. Both California and federal law recognize arbitration as a fair and efficient vehicle for resolving legal disputes.

An agreement to arbitrate disputes may be a standalone contract, or it may be included as a provision within a larger contract. In either event, any ambiguity will be construed against the drafter of the agreement. (Civ. Code, § 1654; *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 247-248.)

But not every purported arbitration agreement is enforceable. Under what circumstances may a party to such an agreement bypass arbitration and bring a claim in court?

Agreements are generally enforceable

California law provides that written agreements to submit disputes to arbitration are considered enforceable unless there are grounds for rescission. Code of Civil Procedure section 1281 provides that "[A] written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract."

Federal law, at section 2 of title 9 of the United States Code, states that "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract…."

Online agreements to arbitrate can take many forms. California law recognizes clickwraps, browsewraps, scrollwraps, and sign-in wraps, each type classified "by the way in which the user purportedly gives their assent to be bound by the associated terms." (*Sellers v. JustAnswer LLC* (2021) 73 Cal.App.5th 444, 463.) A clickwrap agreement requires users to click on an "I agree" box after being presented with the terms and conditions of use. Courts "routinely uphold clickwrap agreements for the principal reason that the user has affirmatively assented to the terms of agreement by clicking 'I agree.'" (*Meyer v. Uber Techs. Inc.* (2d Cir. 2017) 868 F.3d 66, 75.) Whether entered into in writing, online, or by other action, arbitration agreements will generally be considered enforceable unless there are clear grounds for revoking them. The principal grounds for holding arbitration agreements unenforceable are that no agreement was created between the parties, the agreement was procured through fraud or duress, or the terms of the agreement were unconscionable.

A "click-to-cancel" rule promulgated by the Federal Trade Commission was to take effect on Monday, July 14, 2025. The rule required sellers to make it easier for consumers to cancel unwanted recurring memberships or subscriptions. On July 9, 2025, the U.S. Court of Appeals, Eighth Circuit, halted and vacated the rule, suggesting the FTC needs to provide the results of an economic impact study.

Was there an agreement?

Arbitration agreements, like all contracts, require a meeting of minds and a common understanding of what was agreed. When one party disputes that an agreement was effected, the burden shifts to the party seeking to enforce arbitration to prove by a preponderance of the evidence that an agreement was in fact reached.

In *Gamboa v. Northeast Community Clinic* (2021) 72 Cal.App.5th 158 (*Gamboa*), the appellate court ruled that the mere presentation of a written arbitration agreement without supporting testimony failed to establish a valid agreement. Citing *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413, the court wrote, "'Because the existence of the agreement is a statutory prerequisite to granting the [motion or] petition, the [party seeking arbitration] bears the burden of

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proving its existence by a preponderance of the evidence.'" (*Gamboa*, at pp. 164-165.) The employer could have met this burden with a declaration from its custodian of records, but it failed to proffer admissible evidence. (*Id*. at p. 171.)

Even when there is no agreement in writing, an agreement may exist. California courts have held that a party's silence can evidence agreement to arbitrate disputes. In *Diaz v. Sohnen Enterprises* (2019) 34 Cal.App.5th 126, an employee who refused to sign an arbitration agreement continued working for the company. Because the employer informed her that continuing to work constituted acceptance of the agreement, the court said that her silence, coupled with her continued employment, signified acceptance. (*Id*. at p. 131.)

"California law in this area is settled: when an employee continues his or her employment after notification that an agreement to arbitration is a condition of continued employment, that employee has impliedly consented to the arbitration agreement." (*Diaz*, *supra*, 34 Cal.App.5th at p. 130.)

Was the agreement executed?

Written agreements generally require signature to be enforceable; online agreements may be executed with an electronic signature or a simple click. In *Espejo v. Southern California Permanente Medical Group* (2016) 246 Cal.App.4th 1047 (*Espejo*), an electronic signature on an online employment application containing an arbitration provision was held to be enforceable. Citing Civil Code section 1633.7, the appellate court noted that an electronic signature has the same effect as a handwritten signature but, as with any writing, it must be authenticated before being received into evidence. (*Espejo*, at p. 1061.)

A new employee's execution of an acknowledgment of provisions in the employee handbook containing a predispute arbitration agreement as an appendix was held to be a consent to arbitrate future disputes. In *Harris v. TAP Worldwide, LLC* (2016) 248 Cal.App.4th 373, the court found that the acknowledgement form signed by the plaintiff acknowledged receiving both the employee handbook and the attached arbitration agreement, which was specifically highlighted in the signed acknowledgement form as the appendix to the handbook.

Was the link clear?

To establish mutual assent for the valid formation of an internet contract, a provider must demonstrate that the contractual terms were presented in a manner that made it apparent that the signer was assenting to those very terms when clicking a box or button, not that he or she actually read each provision.

If the terms of an online agreement, including its arbitration provision, are conspicuous, users will generally be bound to those terms. The Ninth Circuit ruled in *Keebaugh v. Warner Bros. Entertainment Inc.* (9th Cir. 2024) 100 F.4th 1005, that notice is sufficiently conspicuous if it is "'displayed in a font size and format such that the court can fairly assume that a reasonably prudent Internet user would have seen it.'" (*Id*. at p.1014, citing *Berman v. Freedom Financial Network, LLC* (9th Cir. 2022) 30 F.4th 849, 856 (*Berman*).)

If the terms and conditions are disclosed through hyperlinks, the presence of those hyperlinks "must be readily apparent." (*Berman*, *supra*, 30 F.4th at p. 857.) "Simply underscoring words or phrases ... will often be insufficient to alert a reasonably prudent user that a clickable link exists." (*Ibid*.)

In *Herzog v. Superior Court* (2024) 101 Cal.App.5th 1280 (*Herzog*), the court found that Dexcom's sign-up interface for users of its glucose-monitoring app created ambiguity about what users were agreeing to. While there was a checkbox to agree to terms of service, the accompanying text focused on privacy and data sharing rather than arbitration. The court ruled this was insufficient to create a binding arbitration agreement, as it did not provide clear notice that users were waiving their right to pursue claims in court.

Although clickwrap agreements are generally enforceable, the court said, "Dexcom undid whatever notice it might have provided of the contractual terms by explicitly telling the user that clicking the box constituted authorization for Dexcom to collect and store the user's sensitive, personal health information." (*Herzog*, *supra*, 101 Cal.App.5th at p. 1286.) "[T]o establish mutual assent for the valid formation of an internet contract, a provider must first establish the contractual terms were presented to the consumer in a manner that made it apparent the consumer was assenting to those very terms when checking a box or clicking on a button." (*Sellers v. JustAnswer LLC* (2021) 73 Cal.App.5th 444, 461.)

Two recent Ninth Circuit cases underscore the imperative of a contractual "meeting of the minds" when users transact with vendors online. In *Chabolla v. ClassPass Inc.* (9th Cir. 2025) 129 F.4th 1147 (*Chabolla*) and *Godun v. Justanswer* (9th Cir. 2025) 135 F.4th 699, the plaintiffs were found not to have manifested assent to terms of use that included an arbitration provision. Online contracts, the *Chabolla* court said, "are subject to the same elemental principles of contract formation as paper contracts." (*Chabolla*, at p. 1154.) Important provisions must be prominently displayed or notice of their existence must be "reasonably conspicuous." The websites at issue in both cases provided no clear notice of contract terms and no opportunity for plaintiffs to manifest unambiguous assent to those terms.

Were the terms understood?

As long as notice of the agreement is sufficiently conspicuous and the end user has clicked to accept, it is immaterial that the user failed to read the terms and conditions. In *B.D. v. Blizzard Entertainment, Inc.* (2022) 76 Cal.App.5th 931 (*Blizzard Entertainment*), the court stated that "mutual assent is determined under an objective standard applied to

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the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings." (*Id.* at p. 943.)

The court further explained that if an offeree objectively manifests assent to an agreement, the offeree cannot avoid a specific provision of that agreement on the ground the offeree did not actually read it. (*Blizzard Entertainment*, *supra*, 76 Cal.App.5th at p. 943.) To establish mutual assent for the valid formation of an internet contract, a provider must demonstrate that the contractual terms were presented to the consumer in a manner that made it apparent that the consumer was assenting to those very terms when clicking a box or button, not that the consumer actually read each provision. (*Id.* at pp. 943-944.)

An arbitration agreement in a condominium recorded covenant before construction and owner occupation was upheld against a construction-defect claim by the homeowner's association, even though the homeowners never read the arbitration agreement. (See *Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (*US*), *LLC* (2012) 55 Cal.4th 223, 238, 243.)

Was the agreement unconscionable?

Essentially, the only ways to bypass arbitration when the terms are conspicuous and the user has clicked or otherwise signaled agreement is to show either lack of clarity as to what is covered by those terms or to establish that the agreement itself, or its arbitration provision, is unconscionable.

Civil Code section 1670.5, subdivision (a) provides that if a court as a matter of law finds "the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

When arbitration provisions have been challenged on unconscionability grounds, courts have generally been unwilling to rule for plaintiffs. In the *Keebaugh* case, *supra*, the Ninth Circuit found that, even though Warner Bros. included an unenforceable ban on seeking public injunctive relief, its arbitration agreement was not unconscionable. In the *Blizzard Entertainment* case, the appellate court responded to the plaintiff's contention that the arbitration agreement was unconscionable by saying that the agreement "clearly and unmistakably" delegated such questions to the arbitrator.

In *Chilutti v. Uber Technologies* (2023) 300 A.3d 430 (*Chilutti*), however, a Pennsylvania appellate court ruled that Uber failed to provide sufficiently clear notice of its arbitration clause. The court emphasized that the constitutional right to a jury trial should be afforded the highest protection and found that Uber's interface did not adequately inform users they were waiving this right.

For an arbitration agreement to be valid in this context, the court said, the waiver of jury trial rights must be "explicitly stated on the registration websites and application screens" and "appear at the top of the first page in bold, capitalized text" when users click to view the full terms. (*Chilutti*, *supra*, 300 A.3d at p. 450.)

In August 2024, a Petition for Allowance of Appeal was granted by the Supreme Court of Pennsylvania asking, among other things, whether the special notice rule for enforcing online arbitration agreements violated the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.), and whether online arbitration agreements should be enforced under the same rules applicable to contracts generally under Pennsylvania law.

Can arbitration be waived?

In 2003, in *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187 (*St. Agnes*), the California Supreme Court said that "a party who resists arbitration on the ground of waiver bears a heavy burden" and that any doubts regarding waiver "should be resolved in favor of arbitration." (*Id.* at p. 1195.) Such a position, the court said, was consistent with the FAA.

When the contractual right at issue is the right to demand arbitration of disputes, both federal and state case law had required a showing of prejudice because of the delay. But in 2022 the U.S. Supreme Court ruled in *Morgan v. Sundance* (2022) 596 US 411, that despite the FAA's "policy favoring arbitration," there was no legal requirement for an arbitration-specific waiver standard. Arbitration contracts, the court said, are no different than other contracts when it comes to waiver of rights. Any action that would be deemed a waiver of contractual rights in another context is also a waiver in the arbitration context.

Based on this decision, the California Supreme Court reversed a lower-court ruling compelling arbitration in a wrongful-termination lawsuit. In *Quach v. California Commerce Club Inc.* (2024) 16 Cal.5th 562, the Court adopted the federal approach and jettisoned the prejudice standard for waiver of the right to arbitration. In *Quach*, the defendant had waited 13 months before filing a motion to compel arbitration. The California Supreme Court ruled that the plaintiff should be able to make a case for waiver without a showing of prejudice.

In a recent decision, however, the Court of Appeal ruled that failure to initiate arbitration did not constitute waiver of that right by the defendant. In *Arzate v. ACE American Ins. Co.* (2025) 108 Cal.App.5th 1191, the court held that the responsibility to initiate arbitration rested with the party asserting the employment- related claims rather than with the party requesting arbitration. The agreement, it noted, did not assign the duty to commence arbitration to the employer but to the party who "wants" to commence arbitration. Additionally, the AAA rules incorporated into the agreement assigned responsibility for initiating arbitration to the claimant.

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How broad is the agreement?

Recent cases have focused on the breadth of arbitration provisions in online agreements. When Disney sought to compel arbitration in a wrongful-death case brought by the widower of a woman who died at a theme park, it relied on terms that were part of the fine print of the clickwrap license for a Disney+ trial subscription. Uber relied on similar terms in its online UberEats agreement when it sought arbitration for a personal injury claim resulting from an Uber rideshare accident.

A bill now under consideration in Sacramento could change this picture. Senate Bill 82 by Senator Tom Umberg would "for contracts for the sale or lease of consumer goods or services entered into on or after January 1, 2026, require an agreement to arbitrate to be limited to a claim arising out of *and relating to* the contract containing the agreement to arbitrate." (*Ibid*., emphasis in original.) If the bill becomes law, the Disney+ terms and conditions would not extend to claims related to Disney theme parks; UberEats terms would apply only to the purchase of food and other products through that app.

Conclusion

Arbitration has become a standard part of most agreements, from employment contracts to online purchases, and courts have generally recognized the right of parties to require that disputes be heard by arbitrators. But, for a number of reasons, many purported arbitration agreements have been found not be enforceable. It is important, therefore, for those drafting and those signing contracts to understand the circumstances under which arbitration provisions may be invalid.

Hon. Tricia Bigelow (Ret.) is a neutral with Signature Resolution. *She served as a Los Angeles Municipal Court and Superior Court Judge prior to her appointment as an Associate Justice and then Presiding Justice of the California Court of Appeal, Second Appellate District, Division 8. She was awarded the Ronald M. George Award of Excellence (Judge of the Year) from the California Judicial Council in 2014 and was a co-awardee of the Bernard S. Jefferson Award for Excellence in Judicial Education from the California Judge's Association in 2015. From 2006 to 2008, she was Dean of the California Judges College, where she oversaw the education of all new judges in the state of California.*